







HINDOO LAW.

DEFENCE OF THE DAYA BHAGA.

THE CHURCH

OF THE FUTURE

HINDOO LAW.

DEFENCE OF THE DAYA BHAGA.

NOTICE OF THE CASE ON PROSOONO COOMAR TAGORE'S WILL.

JUDGMENT

OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

EXAMINATION OF SUCH JUDGMENT.

BY

JOHN COCHRANE,

BARRISTER-AT-LAW.

LONDON:

W^M H. ALLEN & CO., 13, WATERLOO PLACE, PALL MALL.

1872.

LONDON :
PRINTED BY HENDERSON, RAIT, AND FENTON,
BERNERS STREET, OXFORD STREET, W.C.

TABLE OF CONTENTS.

The Decision of the Judicial Committee of the Privy Council, in the case of Tagore v. Tagore, has given rise to the following examination of a portion of the law of Bengal, in which, after noticing the different doctrines held by the Daya Bhaga and Mitacshera, at pp. 1 and 2,

I proceed to consider, first, the rights of the Father and Son ; secondly, the rights of the Widow ; and thirdly, the rights of the Daughter and Daughter's Son.

I then notice Sir W. Macnaghten's work on Hindoo law, published in 1829, in which he maintained that a Father in Bengal could not will away ancestral real estate from his Sons, citing several passages from his work, from pp. 5 to 11.

I refer to various cases decided by the Courts in India in which a contrary doctrine was supported, pp. 11 to 15.

Case in Ejectment, in which the above question again came before the Supreme Court, p. 15.

Letter of the Judges of the Supreme Court to the Judges of the Sudder Dewanny Adawlut, p. 15.

Reply of the five judges of the Sudder Dewanny Adawlut, on the 2nd of September, 1831, unanimously maintaining the right of a Father who has Sons to sell, give, or pledge, without their consent, immovable ancestral property situate in the province of Bengal, and that, without the consent of the Sons, he can by Will prevent, alter, and affect their succession to such property, pp. 15 and 16.

The Decision of the Supreme Court on the Ejectment case was in unison with the opinion of the five Judges of the Sudder, p. 16.

Observations of Sir Edward Ryan in giving judgment, p. 16.

Memorandum of Mr. Shakespeare, one of the five Judges of the Sudder Dewanny Adawlut, giving the reasons of his decision, p. 17.

✓ I then proceed to examine the rights of the Father by the Daya Bhaga and other authorities at considerable length, p. 24 and subsequent pages.

Observations on the alleged right of Sons to force a Partition irrespective of the Will of the Father, with remarks on opinions of Colebrooke, Ellis, and Sutherland—together with the decisions of the Courts of the Sudder and North-West Provinces—and various Hindoo authorities, pp. 34 to 48.

- I examine the opinion of Chutterborj in the case in 2 S. D. A., p. 105, such opinion being contradicted by the text of Nareda, 2 Digest, 101, and by the fact that in Bengal the Father is the owner of the property, pp. 53 to 55.
- Remarks on certain cases at Madras, pp. 60 to 64.
- A notice of the case of Sudabert v. Foobash Koer, 3 Bengal Reports, p. 31, and 1 Norton's Cases, p. 219, decided by the High Court of Calcutta (*see* p. 65), with judgment of Chief Justice.
- Remarks on the case in 8 Sutherland's Weekly Reporter, p. 16, decided by the High Court at Calcutta (*see* p. 77).
- Notice of the case of Nagalinga Moodelly, p. 292 of 1 Norton's Cases, p. 78.
- Passage in Colebrooke's Mitacshera, p. 279, par. 8, c. 1, s. 5, unwarranted by authority, p. 81.
- Rights of the Widow examined, pp. 81 to 93.
- A mistake of the late worthy Professor of Sanscrit, Mr. Goldstucker, in commenting on the Sevangunga case regarding separate property, p. 93.
- Remarks of the above learned Professor regarding the non-existence of an alleged right of survivorship among Brothers, p. 93.
- Lord Justice Turner's judgment in Sevangunga's case, with remarks, pp. 94 and 95.
- Sir W. Jones's opinion in unison with the author of the Daya Bhaga, p. 96.
- Rights of the Daughter and Daughter's Son, p. 99.
- Judgment of Mr. Justice Dwarkanath Mitter, p. 102.
- Advice of Sir W. Jones regarding translating the leading Sanscrit words neglected, p. 110.
- One or two errors in the work of that able writer, Sir William Macnaghten, pointed out, p. 110.
- A decision of the High Court, Vol. VI. Sutherland's Weekly Reporter, p. 147, alluded to, and shown to be clearly erroneous, pp. 111 to 113.
- Case of Tagore v. Tagore, p. 113.
- Will of Prosono Coomar Tagore, pp. 113 to 131.
- Two Codicils thereto, pp. 132 to 135.
- Plaint filed in High Court by Ganendro Mohun Tagore, on 17th December, 1868, pp. 135 to 140.
- Written statement of Executors and others, pp. 140 and 141.
- Issues in the suit, pp. 141 and 142.
- Decree of High Court, 1st April, 1869, dismissing Plaintiff's suit, p. 142.
- Appeal by Plaintiff to High Court, Appellate Jurisdiction, from above decree, p. 142.
- Decree of the Appellate Jurisdiction, reversing the decision of Mr. Justice Phear, decree set out, pp. 144 to 146.
- Remarks of Sir Barnes Peacock accompanying decree, pp. 146 to 216.
- Remarks of Mr. Justice Norman, pp. 216 to 239.
- Petition of Joteendro Mohun Tagore against the decree, dated 13th December, 1869, p. 239.

Petition of Shourendro Mohun Tagore against such decree, of date 17th December, 1869, p. 240.

Petitions allowed, p. 240.

Petition of Ganendro Mohun Tagore for leave to appeal from decree of 1st September of Appellate Court allowed by Privy Council, pp. 240 to 244.

Appeals consolidated, p. 240.

Joint petition of Joteendro Mohun Tagore and Shourendro Mohun Tagore presented, p. 240.

Petition of Ganendro Mohun Tagore with case, pp. 244 to 247.

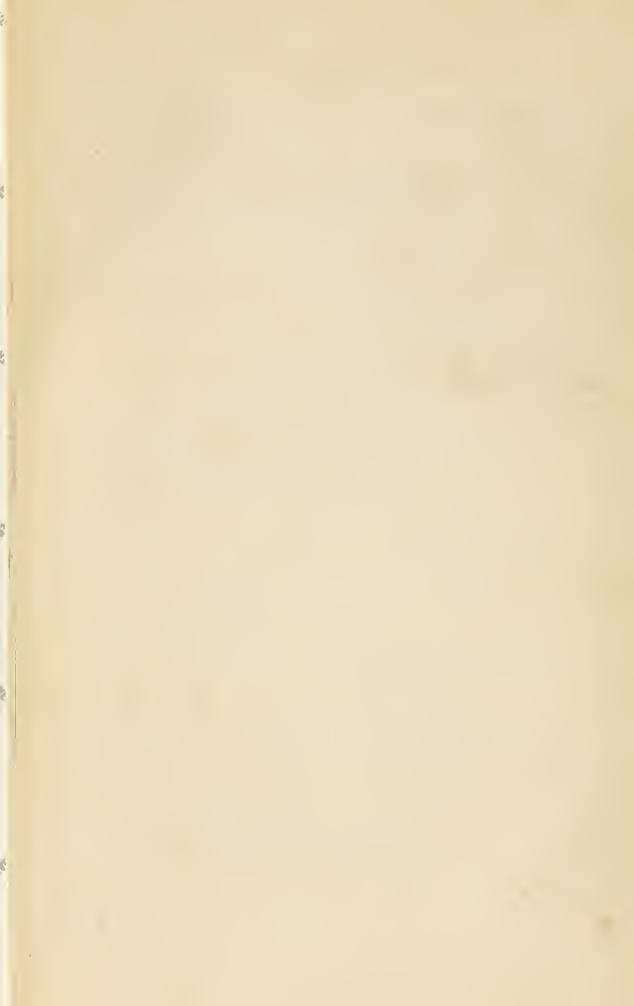
Case came on for hearing, p. 247.

Remarks on the judgment of the Court below and on the case furnished to Counsel, pp. 248 to 321.

Case heard and Court took time to consider judgment,
Order of Court for guardian of infant in India to appear, } p. 321.
No appearance entered by party summoned,

Judgment of the Judicial Committee of the Privy Council, pp. 321 to 355.

Examination of the above judgment by the author, pp. 355 to end.



A DEFENCE

OF THE

DOCTRINE MAINTAINED BY THE DAYA BHAGA
OF JIMUTA VAHANA.

THE Daya Bhaga, by Jimuta Vahana, has been for upwards of 400 years the leading authority regarding inheritance in the Province of Bengal. (Sir Thomas Strange's work, Vol. I., page 261; Saumchurn, pages 14 and 15 of preface.) This celebrated treatise was translated by Mr. Henry Colebrooke along with Vinyaneswara's Mitacshera, a commentary on the Institutes of Yajnyawalkya in 1810.

In selecting the Daya Bhaga for translation, Mr. Colebrooke, at page 7 of his preface, observes, "The preference appeared to be decidedly due to the treatise of Jimuta Vahana himself, as well because he was the founder of the Bengal School, being the author of the doctrine it has adopted, as because the subjects which he discusses are treated by him with eminent ability and great precision."

The learned translator at another part of his preface remarks, "that Jimuta Vahana's treatise is on every disputed point opposite in doctrine to the Mitacshera, and has no deference for its authority."

I may as well here point out the leading differences between the Daya Bhaga and the Mitacshera :—

Bengal Daya Bhaga.

Mitacshera.

1. That a Father can sell or will away the entire estate by the law of Bengal.

That, by Mitacshera, a Father cannot will away ancestral immovable property from Sons.

*Bengal Daya Bhaga.**Mitacschera.*

2. That the ownership of the property is entirely in the Father, and that Sons, by law of Bengal, have no vested right.

3. That Sons, by law of Bengal, cannot claim partition irrespective of the Will of the Father, except under special circumstances.

4. That, by Daya Bhaga, an unseparated owner can sell his share without consent of others.

5. That the Widow succeeds as heir to the Father who dies without male issue, whether united or disunited.

6. That after the Widow the Daughter succeeds as heir.

The Mitacschera alleges that Sons have a right by birth in the ancestral immovable estate.

Par. 8, p. 269.

Sons, according to Mitacschera, can claim partition against the will of the Father.

That, unless partition, an unseparated owner cannot sell.

That the Widow only succeeds as heir when the Brothers are separated.

That the Daughter does not succeed when undivided, but only takes maintenance.

Such being the difference between these writers, it will be my object to show that the principles laid down by Jimuta Vahana are mainly supported by the authority of Menu and other inspired legislators. I will first examine the rights of the Father and Son,

2ndly. The rights of the Widow, and

3rdly. The rights of the Daughter and Daughter's Son.

As I shall have frequent occasion to refer to Jaganatha's Digest in the course of my remarks, I may as well notice Mr. Colebrooke's observation at pages 2 and 3 of his preface to the translation of the Daya Bhaga. "In the preface to the translation of the Digest, I hinted an opinion unfavourable to the arrangement of it, as it has been executed by the native compiler. I have been confirmed in that opinion of the compilation since its publication; and indeed the author's method of dis-

cussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner which of them is the received doctrine of each school; but, on the contrary, leaving it uncertain whether any of the opinions stated by him do actually prevail, or which doctrine must now be considered to be in force and which obsolete, renders his work of little utility to persons conversant with the law, and of still less service to those who are not versed in Indian jurisprudence, especially to the English reader, for whose use, through the medium of translation, the work was particularly intended." Such remarks were repeated by Sir Thomas Strange in the preface to his work Vol. I., p. 18. Speaking of the Digest, he observed, "It is long, therefore, since it was characterized, not unhappily, as 'the best law book for a counsel, and the worst for a judge.'" Sir Thomas Strange might well add: "But, in whatever degree Jaganatha's Digest may have fallen in estimation, as a book to be used with advantage in our Courts, and especially in those to the southward, it contains a mine of juridical learning, throwing light upon every question on which it treats, whatever attention it may require in extracting it."

Subsequent examination, however, has given rise to a very different estimate as to the merits of the Digest.

Mr. Borrodaile, in his preface to the Moyhooka, pp. 5 and 6, observes, "The great value of the Digest to English readers will be found probably in its collection of texts, which includes under each of its heads all the above sacred authors. Scarcely one of those applicable to inheritance from Menu have been omitted by Jaganatha, and a classification, made for private use by the translator, of all the texts of each author contained in the present translation, shows that the Digest contains a great many of each author not to be met with in the others. When freed from a perplexing commentary, it forms an excellent key to those Sanscrit works of a similar nature called Smirti Sangurhu, as the English version of any text may be found in a few minutes. Saumchurn also, in a note to his work, page 28 of preface, coincides with the opinion of Mr. Morley, who observed,

“that notwithstanding the unfavourable opinions of the Digest pronounced by its learned translator and others, there is no doubt that it contains an immense mass of most valuable information. The accuracy of the learned translator’s remark, ‘that, for the reasons noticed by him, the work is of little utility even to persons conversant with the law,’ may be questioned. Persons conversant with the Hindoo laws, as current in the different schools, setting an opinion with the name of its author, may recollect or discover to what school he belongs; nor can it be difficult for them to know whether that opinion prevails in any school, or is become obsolete. At any rate, they will find in the book almost all the important texts of almost all the ancient and modern works, with comments or expositions, so numerous, curious, and interesting, that no work in existence can impart half the information or knowledge which Jaganatha’s Digest does; and possessed of this immense mass of opinions and information, they can easily select those justly referable to each of the different schools; those conversant with the doctrines of the Hindoo laws, as current in the different schools, cannot therefore fail to derive very great benefit from this work.”

To this I may add, that as the texts of the original legislators were promulgated long before any schools ever existed, we are enabled to test the accuracy of the various treatises by the texts themselves.

The Digest of Jaganatha being thus, as I apprehend, misrepresented, it would be hard if the founder of the Bengal school escaped. The following is taken from Mr. Justice Strange’s Manual of Hindoo Law, pages 6 and 7 of preface:—“In Bengal, however, the law has not been so stable as in other parts of India. There usage has been allowed largely to invade the written law, and this under a directly recognized principle, the effect of which, if carried to its true extremity, would be to break down all law. ‘A fact,’ says their great authority, the Daya Bhaga, ‘cannot be altered by a hundred texts,’ or, in other words, personal convenience is to be the law to every man. Society has of course not permitted itself

to run riot to this extent; but where the exact demarcations of the law are not well maintained, uncertainty and confusion must ensue. In Bengal, more than elsewhere, a class of interpreters has sprung up, who govern the written law by their own ideas, projected as interpretations of the true intent of the law. Where mere opinion is allowed such a latitude, conflict will, of course, largely prevail. The Digest of Jaganatha, compiled under the auspices of Sir Wm. Jones, affords notable evidence of the condition to which the law of Bengal has been reduced by its interpreters; and thence has arisen the bad repute, deserved in great measure in Bengal, but undeserved in the rest of India, of which it has been too often unfairly and ignorantly asserted that you may find a text and a Pundit in support of every conceivable position of law, however discordant."

It will be my province to show that such observations, so far as they apply to the Treatise of Jimuta Vahana, are unwarranted.

In order to clear my way to the examination of the rights of a Father by the law of Bengal, I may remark that Sir W. Macnaghten, in his work published in 1829, maintained that a Father, even in Bengal, could not will away ancestral landed estate from his Sons. That no mistake may be made, I give the various passages from his work and the arguments used by him. As Sir William's work is in the hands of all parties, I will point out a few mistakes, independent of the immediate subject of examination, into which this able and respected writer has fallen, at the close of my remarks.

Sir William Macnaghten, at page 2, Vol. I., when speaking of the rights of Sons, observes: "That an indefeasible inchoate right is created by birth seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth and the relinquishment by the occupant (whether effected by death or otherwise), conjointly create this right, the inchoate right which previously

existed becoming perfected by the removal of the obstacle—that is, by the death of the owner (natural or civil), or his voluntary abandonment. In ancestral real property, the right is always limited, and the Sons, Grandsons, and Great-grandsons of the occupant—supposing them to be free from those defects, mental or corporal, which are held to defeat the right of inheritance—are declared to possess an interest in such property equal to that of the occupant himself—so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants more than another.

“The property of the Father being thus restricted, in respect of ancestral real property, and wills and testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside where they are at variance with the law; otherwise a person would be competent to make a disposition, to take effect after his death, to which he could not have given effect during his lifetime. A will is nothing more or less than ‘the legal declaration of a man’s intentions which he wills to be performed after his death;’ but willing to do that which the law has prohibited cannot be held to be a legal declaration of a man’s intentions. There may be a gift in contemplation of death; but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos* may not be done by will; of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which though immoral and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a Father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his Sons by preferring one or excluding another without

sufficient cause. This has been declared in the Daya Bhaga to be a precept, not a positive law; and it is therein laid down that a gift or transfer under such circumstances is not null, 'for a fact cannot be altered by a hundred texts.'"

There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which declare the absolute nature of the Father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to *a positive law, which declares the ownership of the Father and the Son to be equal with respect to this description of property*. But it cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or in other words to signify that an act may be legally right though morally objectionable. Thus a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the Mitacshera prevails (which does not recognize any several right until after partition or the principle of *factum valet*), would undoubtedly be both illegal and invalid. But according to the Daya Bhaga, which recognizes this principle, and also a several though unascertained right in each coparcener even before partition, a sale or other transfer under such circumstances would be valid and binding as far as concerned the share of the transferring party. Sir William then alludes to two cases decided according to such difference of opinion.

At page 6, speaking with reference to the general proposition laid down by him, he observes: "I am aware that cases have been decided in opposition to the doctrine for which I here contend." He then reviews some of the cases, which will be subsequently noticed.

At page 14, after reviewing such cases, Sir W. Macnaghten thus remarks: "Upon the whole, I conclude that the text of the Daya Bhaga, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property where such

power is not expressly taken away by some other text. Thus in Bengal, a man may make an unequal distribution among his sons of his personal acquired property, or of the ancestral movable property; because, though it has been enjoined to a Father not to distinguish one Son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the Father is master of all movable property and of his own acquisitions, the maxim that a fact cannot be altered by a hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those that condemn the practice. In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal."

With reference to a Father distributing the ancestral estate, the same author, at page 44 of his first volume, observes: "The law of Benares, on the other hand, prohibits any unequal distribution by the Father of ancestral property, of whatever description, as well as of immovable property acquired by himself." This subject has been treated of at great length by the author of the "Considerations on Hindoo Law" (Sir Francis Macnaghten), in the chapter on Gifts and Unequal Distribution; and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion that a gift, even of the entire ancestral immovable property, to one Son, to the exclusion of the rest, is sinful, but, nevertheless, valid if made. It must be recollected that he was treating of the law as current in Bengal only, and not elsewhere. My reasons for arriving at an opposite opinion are: first, because the doctrine for which I contend has been established by the latest decision (2 S. D. A., p. 202) founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and, secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Daya Bhaga*: "The texts of Vyasa, exhibit-

ing a prohibition, are intended to show a moral offence; they are not meant to invalidate the sale or other transfer." "Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one, but the gift or transfer is not null, for a fact cannot be altered by a hundred texts." Now if these passages are to be taken in a general sense, if they are to be held to have the effect of legalizing, or at least rendering valid, all acts committed in direct opposition to the law, they must have the effect of superseding all law, and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions.

The example adduced by the commentator to illustrate these texts, clearly shows the spirit in which this unmeaning, though mischievous, dogma was delivered; he declares that a fact cannot be altered by a hundred texts; in the same manner as the murder of a Bramin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or, in other words, that the defunct Bramin cannot be brought to life again. The illustration might be apposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of Vyasa in question occur in the chapter of the *Daya Bhaga* which treats of self-acquisitions, and has no reference to ancestral property. Sir William Macnaghten then quotes the passage from the *Mitacshera*, that "the ownership of Father and Son is the same in land which was acquired by the Father," being taken from *Yajñijawalkya*, and on which I will fully comment.

Sir William Macnaghten, at pages 46 and 47, proceeds: "The question as to the extent to which an unequal distribution made by a Father in the Province of Bengal should be upheld, has been amply discussed also in the report of a case decided by the Court of Sudder Dewanny Adawlut in the year 1816 (the case in 2 S. D. A., p. 202, to which he has alluded), wherein it was determined that an unequal distribution of ancestral immovable property is illegal and invalid, and that the unequal

distribution of property acquired by the Father, and of movable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, 2 S. D. A., p. 215, that the validity of an unequal distribution of ancestral immovable property, such as is expressly forbidden by the received authorities on Hindoo law, cannot be maintained on any construction of that law by Jimuta Vahana or others.

Jaganatha, in his Digest, maintains an opinion opposite to this, and lays it down that if a Father, infringing the law, absolutely give away the whole or part of the immovable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive; and admitting this doctrine to be correct, it must be inferred, *à fortiori*, that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to. Sir W. Macnaghten is in error in supposing that Bhowanychurn's case, 2 S. D. A., p. 202, was the latest decision. The case of *Kimula Comul Chuckerbatty v. Gooroo Gorrua Chondry*, reported in the 4 S. D. A., p. 322, decided, in unison with former Vyavasthas, that by the Hindoo law, current in Bengal, a Son has no right whatever in the ancestral property inherited by his Father during his Father's lifetime.

The remarks of Sir William Macnaghten, at page 46 of his first volume, that the texts of Vyasa occur in the chapter of the *Daya Bhaga* which treats of self-acquisitions, and has no reference to ancestral property, is a clear mistake, as may be seen at once by referring to the following heading of the chapter itself:—

“CHAPTER SECOND.

“Partition made by a Father of Property Ancestral and of his own Acquisitions.”

As the question regarding the power of a Father in Bengal to will away ancestral and self-acquired estate has been

lately renewed, it may be useful to notice the various decisions which preceded and followed the publication of Sir William's book.

So far back as 1780, in Desherell's case (East's Notes, Case 124), a will by a party giving the whole of his property to his third and fourth Sons, only requiring them to pay Rs. 10,000 to his Wife, and making no mention of his eldest and second Sons, was held by the Supreme Court at Calcutta to be valid.

There is another case reported in Morton's Reports, at page 80, *Doe a Munnoo Lall v. Gopee Dutt*, and others, determined on the 16th August, 1786, by the Supreme Court. The testator, a Hindoo, devised lands away in exclusion of his Daughter and the Son of his Brother. The will was held valid. At page 1 of *S. D. Adawlut Reports*, Vol. I., in the case of *Rum Rutton Sing v. Churda Narain*, the Court held that the holder of a separate share in a zemindary might sell his share to whom he pleased.

The next case was one from Nuddea, decided in 1792 on a will executed by a Father in 1781. He gave his zemindary to the eldest of his four Sons. One of younger Sons sued for a fourth share after the death of his Father: the Court upheld the will of the Father (1 *S. D. Adawlut*, p. 2).

The next case is one reported at page 42 of 2 *S. D. A.* *Ramcoomar v. Kissen Kinker*. The marginal note is "The gift by a Father of the whole ancestral estate to one Son, to the prejudice of the rest—or even to a stranger—declared a valid act (although an immoral act), according to the doctrine received in Bengal." The next case is one reported at page 309, 2 *S. D. A.*, *Kissen Govind v. Ladley Mohun Tagore*. It was there determined that a Hindoo having no Son, having executed a deed by which he gave to his Widow his whole acquired property in the event of no Son being born, was supported.

The next case was the case of *Bhowany Persand v. Mussu-mut Tarramonee*, page 138 of 3 *S. D. A.* According to the marginal note, it was determined "that according to the Hindoo law, as current in Bengal, a coparcener may dispose of,

by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a Daughter and a Daughter's Son living.

Another authority may be found at page 397 of 3 S. D. A., *Tarnee Churn Law v. Mossumut Dossee*.

There is also the case in 4 S. D. A., page 323, which will be afterwards alluded to.

Sir Francis Macnaghten also, in his considerations on Hindoo Law, observes at page 319: "With respect to wills, it is now perfectly understood, from the decisions which have taken place in the Supreme Court, that the devise or bequest of a Hindoo will be supported there, if it be made of such property as the testator could lawfully (whether sinlessly or not) have disposed of in his lifetime. But the Court never professed to go further than to permit that to be effected by will which might have been done 'inter vivos.' It never indeed declared, nor do I know that it ever has been called on to declare, any restraint with respect to the disposal of ancestral immovable property. It has determined, on the contrary, that there is not any such restraint." Then, after alluding to various wills from pages 319 to 339, we come to the case of *Nemy Churn Mullick*, in which the Court upheld his will, and declared "that by the Hindoo law *Nemy Churn Mullick* might and could dispose of by will of all his property as well movable as immovable, and as well ancestral as otherwise."

The decree of the Court was confirmed by the Privy Council on appeal. We have no regular report of the appeal except what we get from Sir Francis Macnaghten's book. The case, however, came afterwards before the Privy Council on an appeal from an order of the Supreme Court at Calcutta, disallowing exceptions to the Master's report. See 1, Knapp's Reports, page 245.

In the case of *Durpuram Surmono*, p. 349 of Sir Francis' work, the testator discarded his first and third Sons, and only allowed them maintenance; the will was supported on an ejectment brought by one of the discarded Sons.

There is also the case of *Goverchund Mullick*, page 350 in

Sir Francis Macnaghten's work, where a Father partly disinherited one of his Sons.

The case of *Rushikloll Dutt v. Hurnaul Dutt*, executor of *Muddun Mohun Dutt*, which is alluded to by Sir Thomas Strange—Vol. I. p. 262, as decided in 1789, in which the Testator thought fit to leave the whole of what he possessed to his two younger Sons, to the disherison of the two elder, the second of whom disputed the will. Sir W. Jones is stated to have concurred in the decision. On this case, Sir W. Macnaghten remarks: "The particulars of the case not having been stated, it cannot be safely relied on as a precedent." Mr. Montrion apparently coincides with such opinion, and has given a report of the case in a small work published by him. The case he has given, however, distinctly shows that there was ancestral real property disposed of by the will. The case was important only as showing that Sir W. Jones supported the will, excluding the Son.

In the case of *Debnauth Sandial v. Maitland and others*, p. 371 of Sir Francis Macnaghten's work, the will was supported, and out of an estate of 335,501 rupees, the Court ordered the sum of 226,250 to be applied to religious purposes as the Testator had directed by will.

The right of a Hindoo to dispose of ancestral property, was supported in 1 Taylor and Bell's Reports, p. 341, in the case of *Soojee Monee Dossee v. Denobundo Mullick*.

In 2 Moore I. Appeals, p. 54, in the case of *Mulvay Luchurce v. Chalkany Venata Row*, the Court determined that, by Hindoo law, a Zemindar having no issue is capable of alienating, by deed or will, a portion of his estate—which, in default of lineal male heirs and intestacy, would vest in his Wife without her consent. In 6 Moore I. A., p. 310, in the case of *Nagalutchmee Umal v. Gooptoo Nadaraja Chitty*, the Court upheld a will by a Hindoo without male issue, kinsmen, or coparcener, after providing for his Widow, &c.; and the Court declared that, under the above circumstances, a Hindoo had the power of disposing by will of ancestral estate. The

two last cases are important because the decisions were under the law as declared by the Mitacschera.

With reference to self-acquired property, the Father need not share it with his Sons, this is clear from the last sentence at page 279 c. I., s. 5, par. 11, of the Mitacschera. Repeated decisions in the North-west Provinces have established that a party can will away alike separate and self-acquired property. One case is *Rewan Persand v. Radha Bebee*, 4 Moore, I. A., p. 137; the other is *Nana Nanain Row v. Huree Paul*, 9 Moore, I. A., p. 96, both of which apply to places where the Mitacschera prevails.

I also find in the *Chintamani*, an authority of the Mitilha School, at page 76 of the translation by Prosoono Coomar Tagore, it is laid down "that self-acquired property can be given by its owner at his pleasure." With reference to property on separation, the work is equally explicit. Divided parceners are competent to give away, sell, or do what they please with their respective property, for they have become its lords. Page 314.

In the *Manual of Hindoo Law* published by Mr. Strange, formerly one of the Madras Judges, he observes: "A man without issue may alienate his immovable property, whether ancestral or self-acquired, by will, to the prejudice of all other heirs."

In the case even of a Parsee at Bombay, in 6 Moore, I. A., page 449, the Privy Council held that there was no restraint on the testamentary power of a Parsee.

In addition to this, wills have been repeatedly acknowledged: see Regulation 5 of 1799, Section 2; Regulation 11 of 1793, Section 2; Regulation 10 of 1800, Section 2; and Regulation 17 of 1803, Section 3, 5th paragraph. On the case of *Bhowany-churn* being decided, reported at page 202, 2 S. D. A. Reports. Sir William Macnaghten, then the Registrar of the Sudder Dewanny Adawlut, appears to have considered, in his notes to that case, p. 215, that the law was altered; and in his work on *Hindoo Law*, published in 1829, he maintained that, by Hindoo

law, a Father could not, even in Bengal, will away ancestral lands from his Son. With that candour which ever distinguished him, he very correctly observed that the case in the 2 S. D. A., p. 202, was inconsistent with the other decisions of the Sudder Dewanny Adawlut. This would be perfectly correct if the opinions given by the Pundits in that case were warranted by Hindoo law. The question, however, raised by Sir William Macnaghten's book came before the Supreme Court at Calcutta in an ejectment case. The action was brought by the disinherited Son.

On the 30th of June, 1831, on that occasion two of the Judges, Sir Charles Grey and Sir John Franks, were inclined to support the view taken by Sir William Macnaghten. Sir Edward Ryan, however, the junior Judge, was strongly opposed to the other members of the Court, on the ground that the question had been settled by repeated decisions.

In consequence of a statement of Mr. Clarke, one of the Counsel in the case, that some of the Judges of the Sudder Dewanny Adawlut entertained a different opinion from Sir William Macnaghten, the Judges of the Supreme Court addressed the well-known letter to the Judges of the Sudder, requesting information—First, whether, according to the doctrine of the Sudder Dewanny Adawlut, a Hindoo who has Sons can sell or give, or pledge, without their consent, immovable ancestral property situated in the province of Bengal? Secondly, whether, without the consent of the Sons, he can by will prevent, alter, and affect, in any way, their succession to such property?

The third question was, whether such was at all affected by the decision in the case of Bhowanychurn, in 2 S. D. A., page 202?

To these questions the Judges of the Sudder Dewanny Adawlut, on the 2nd of September, 1831, replied as follows:—

“HONOURABLE SIRS,

“First, we have the honour to acknowledge the receipt of your letter, requesting our opinion as to the doctrine entertained

by the Court of Sudder Dewanny Adawlut on certain points of Hindoo law

“2ndly. On mature consideration of the points referred, we are unanimously of opinion that the only doctrine which can be held by the Sudder Dewanny Adawlut, consistently with the decisions of the Court, and with the customs and usages of the people, is, that a Hindoo who has Sons can sell, give, or pledge, without their consent, immovable ancestral property situate in the Province of Bengal, and that without the consent of the Sons he can by will prevent, alter, or affect their succession to such property.

“3rdly. With reference to the case adverted to in your letter, decided in 1812, we do not consider the opinion of the Judges recorded in that case to affect or contravene the principle on which the previous decisions were founded.”

The ejectment case, which stood over for judgment, was decided in accordance with the above opinion. The following observations were made by Sir Edward Ryan in giving judgment :—“ I concur in the judgment of the Court. Surely the law on this subject ought now to be considered as finally set at rest. The decisions of this Court were uniform from the time of its establishment until the publication of Mr. Macnaghten’s book, and it can be a matter of no wonder that we were misled by his authority; I myself was the first to fall into the error, and nonsuited a party in a suit in ejectment entirely on his statement of the Hindoo law, but on further consideration I think I was wrong. Shortly after his book had raised these doubts, the present case was brought forward, and the Court have had the advantage of an able and elaborate argument of the Bar on both sides of the question. The Judges have most deliberately considered the matter, they have examined all the former decisions of the Court, and they have the unanimous opinion of the five Judges of the highest native Court in India. It is under these circumstances that the Court now unanimously determine that the doubts which they did entertain, in consequence of Sir William Macnaghten’s work, no longer exist, and they return to those doctrines which

have universally prevailed in this Court since its establishment. I therefore hope the question is now finally settled (Clarke's Notes of Cases, pp. 115 to 118).

As this question has been lately revived, it may not be irrelevant to see what opinion was ultimately held by Mr. Colebrooke nearly sixty years ago. In Sir Thomas Strange's 2nd volume, edition 1825, at page 426, Mr. Colebrooke, at the close of his observations, observes: "A Hindoo in Bengal may leave by will, or bestow by deed of gift, his possessions, whether inherited or acquired; and the gift or the legacy, whether to a Son or a stranger, will hold, however reprehensible it may be as a breach of an injunction or precept."

I think it important before approaching the various passages in the *Daya Bhaga* to give the minute which was drawn up by Mr. Henry Shakespear, one of the five Judges, as explanatory of his view of the law.

MINUTE.

"I have given to these questions the best consideration that time and circumstances would admit, not with the hope of throwing any new light on subjects that have been so well and so ably discussed, but in order to examine into them and to assure myself of the grounds on which my opinion should be given.

"In regard to the first question, it will be convenient to consider the power to sell or pledge distinct from the power to give, which is closely allied to the power to will; a will by a Hindoo, as defined by Mr. Colebrooke, being, in fact, a gift made in contemplation of death, which the Hindoo law, if it do not directly sanction, contains at least nothing to prohibit. With respect to sale, the only case in the '*Principles of Hindoo Law*,' in which the presence of the Sons is specifically noticed is at page 312, where it is said: 'A Father having Sons cannot sell the patrimonial estate; without their consent, or without extreme necessity, the sale is void and illegal. But if the family cannot be supported without selling the whole immov-

able and other property, even the whole may be sold or otherwise disposed of.' This doctrine clearly admits of great latitude of construction, for, after all, who ought to be so good a judge of the necessity of selling as the Father himself? It is opposed to the law opinion delivered by the Pundit of this Court in a cause decided in 1829, in which a Father having a Son (10 years old) sold a part of his ancestral landed property, jointly with a person to whom he had made over a life interest in it, on condition of her leaving it to his Son; and on the prosecution of the Son after coming of age (followed up by the guardian of his Son) on the grounds of the incompetency of the vendors to alienate, the Pundit held that the previous transfer did not terminate the Father's right in the property, or bar the alienation of it by him and his Mother (the person to whom he had transferred it) jointly to the prejudice of the natural heir. It was further declared that, by the Hindoo law current in Bengal, a Son has no right in the ancestral property inherited by his Father during his Father's life. If this be sound, it would set the question at rest; for no right in this case did to all intents and purposes bar the claim of the Son on the plea of his not having consented to the Sale. The Pundit, indeed, declared that as long as the Father and his Mother were alive, the consent of the Son was perfectly unnecessary to the validity of the sale of the property, since he had no interest in the soil itself or its profit, and, therefore, it was superfluous to enter into the consideration of whether he was of age or a minor, consenting or not consenting to the sale. (The case Mr. Shakespear refers to is given at page 322 of the fourth volume of S. D. A. Reports.)

"That the foregoing decision is consonant to the practice and understanding of the people, we have every day's experience; and the very circumstance that our records show very few instances of the Son's non-consent being pleaded in bar of the alienation of landed property by the Father, affords a strong presumption that, in the estimation of the people, the consent of the Son is not necessary to the legality of the transfer.

"The promulgation of a contrary doctrine would, I firmly

believe, be attended with the most mischievous and injurious consequences. It would go far to nullify the operation of Regulation 8, of 1819, and place the titles of two-thirds of the Putnee talooks created under that Regulation in jeopardy. Imagine the series of litigations that the doctrine would give rise to, and the simplest case would involve half-a-dozen suits, attended with distress and annoyance to all parties, and little or no benefit to any. It is only when sales involve questions of inheritance that they need to be decided by the rules of Hindoo law; all simple contracts are determinable by the Regulations. The sales which usually take place under the Regulations are in execution of decrees and for arrears of rent due to Zemindars, or to Government. But as the Hindoo law recognizes the liability of the patrimonial property for the payment of debts, and as a defendant's hereditary talook or other hereditary estate would be sold for arrears of rent conformably to the conditions of the tenure, the consent or objections of the Son would in such cases be unnecessary and inadmissible.

"The power of the Father to pledge without the consent of Sons stands much on the same footing as that of selling. Mortgage with conditional sale of landed property is the common mode of raising money; and it may be safely inferred, from the numerous cases before the Court in which no such plea has been advanced, that the power is acknowledged and acquiesced in.

"The following passage, quoted from a judgment passed in a case of mortgage, occurs in the Principles of Hindoo Law, page 107, and shows that this doctrine has long been upheld by this Court. 'That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would of necessity have fallen to the former creditor. That it was mere folly to urge that the act of the Mother in saving it for a time was not to be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubtedly have become absolute to

the creditor. That, according to the invariable practice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindoo of Bengal becomes liable, at his death, for the satisfaction of his just debts, especially when he has pledged his land as security for those debts, and that his power of selling outright or conditionally any part or all of his landed property could not be questioned. That any other doctrine would involve in confusion the acts of the Court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute; and that if their minority in such cases must be considered a bar to foreclosure, and cause the transaction to run on 15 years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present. That the doctrine maintained by the Court appeared to be supported by the opinion of Jaganatha, and that though there should prove to be conflicting opinions as to the law, the established usage and practice ought to prevail; and, in short, whatever might be the real doctrine of the Hindoo law on the subject, the Court was bound to follow that law in matters of inheritance, marriage, and caste, and not in the matters of contract, of which nature the case in question appeared to be.' If the law were to be strictly adhered to, I do not understand why the consent of Sons should be deemed sufficient to legalize the interference of the Father in any way in disposing of the ancestral immovable property. 'They who are born and they who are yet unborn, and they who are still in the womb, require the means of support; no gift or sale should therefore be made.' A man who has neither a Son, nor a Son's Son, nor a Great-grand-Son, is competent to give away his ancestral real estate even though there be other relations living.

"Then we have the text on the other side, which by some is construed to apply to ancestral immovable property, and by

others to be restricted to movable ancestral and immovable acquired property only. 'Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth;' and therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null, for a fact cannot be altered by a hundred texts. This is the distinction that governed the early decisions of this Court in 1792 and 1812, which were considered to have settled the question of a Father's power to make an actual disposition of his property, even contrary to the injunctions of the law, whether by gift, or will, or distribution of shares. But in a case of partition decided in 1816 (or rather in the notes appended to that case) the soundness of the former decisions was brought into question; and the doubts therein expressed, coupled with the comments of our late Registrar on the case, have given rise to the present reference from the Judges of the Supreme Court.

"It will not, however, be difficult to show that the decision itself in that case was not repugnant to the former ones above noticed. In fact, it went upon a different question, viz., the non-delivery of possession, the only point adjudicated being that a Hissenamah, or Deed of Partition, made by a Hindoo Father, in which he allots to his Sons portions of his estate, movable and immovable, ancestral and acquired, but which disposition was not carried into effect during his lifetime, is not binding on his Sons after his death. The remainder of the marginal note on the case is not borne out by the decision, but appears to have reference to the expositions of the Pundits, which in the course of the trial were considered as so irreconcilable that all attempt to ascertain their relative accuracy was given up.

"It will be observed, from the note appended to this case, that the opinion cited at the conclusion of it, which was called for in consequence of the difference of opinions of the law officers of the Sudder Dewanny Adawlut, was not obtained till 1818, two years after the decision of the case, which ought

not to be and cannot be affected by it. It is attempted to weaken the authority of the Nuddeah case, by saying that no opinion was therein taken from the law officers of the Sudder Dewanny Adawlut. That argument, however, does not apply to the second case; and if any weight is to be attached to that circumstance, it may not be irrelevant to remark that the Pundits consulted in 1818, who are considered to have pronounced the true doctrine, were none of them officers of the Court.

“Upon the whole, it appears to me quite clear that Mr. Macnaghten was not warranted in referring to the case decided in 1816 as to the *latest decision* on the question, wherein it was determined that an unequal distribution of ancestral immovable property is illegal and invalid. And here I would observe that the sinfulness of alienating ancestral real property consists in the injury which may thereby be done to the family; the same principle applies to other descriptions of property, which, let it be remembered, a Father is allowed, by the orthodox doctrine, to dispose of, the act being valid, though sinful. But does it follow that the alienation of the property in either case would necessarily be injurious? On the contrary, it might be highly advantageous. And then, as to the practical operation of the prohibition, unless a Father can be prevented incurring debts, it is totally unavailing; for the whole of the Father's estate, whether ancestral or self-acquired, is acknowledged to be liable for his debts, nor could the Son oppose its being sold in satisfaction of them after the Father's death.

“Mr. Colebrooke's opinion on the subject of Wills, to which I referred at the outset, will be found in Sir Thomas Strange's work on the ‘Elements of Hindoo Law’ (Vol. II., p. 419). From the extracts there given from Mr. Colebrooke's letters, it appears he had first stated his opinion ‘that a Hindoo in Bengal may leave by will all his own acquisitions, but would be restricted, if he have Sons, from distributing ancestral property according to his mere pleasure.’ He adds in a subsequent letter. ‘But since the point is here a settled one,

what I said on the subject may require modification.' A Hindoo in Bengal may leave by will, or bestow by deed of gift, his possessions, whether inherited or acquired, and the gift or the legacy, whether to a Son or a stranger, will hold, however reprehensible it may be as a breach of an injunction and precept.

"Now I imagine Mr. Henry Colebrooke to be the highest European authority on matters of Hindoo law; but supposing others to be equally well read, no one can be placed in competition with him as to the two qualifications, a knowledge of the law and of the practice and observances of this Court, in which he was for so many years the chief Judge. Seeing, then, that we have the decisions of this Court upholding the power of the Father of a Hindoo family, without the consent of the Son, to alienate ancestral real property by sale and mortgage, and to make an unequal distribution of such property binding on the Son after the Father's death, that the doctrine is maintained by the eminent authority above quoted, and that our own experience, as well as the customs and usage of the country, as far as it can be gathered from the records of this Court, is also in support of it,—we cannot, I think, hesitate to reply to the questions referred to us in the affirmative, and to add our opinion, that we do not consider the doctrine held in the decisions previously to that of 1816 to have been altered or abrogated by the judgment passed in the later case, 27th August, 1831." It is singular that this able Judge was unaware of the text of Nareda, 2 Digest, 101.

Before I allude to the various texts of the *Daya Bhaga*, I may as well notice some remarks of Mr. Shakespear in the minute above given. He observes that Mr. Macnaghten stated that the case decided in 1816, 2 S. D. A., p. 205, was the latest case on the subject, and he points out a subsequent case reported at page 322 of the 4th S. D. A. Reports. It is but fair to Sir William Macnaghten that I should explain how this decision was unnoticed by him. By the marginal note of the report, the decision was given on the 20th of January, 1829, and was not printed till 1835. Sir William was Registrar of the Sudder Court till the middle of 1828,

and then joined the Secretariat. Mr. Shakespear rests the decision in the 2 S. D. A. on the ground of possession not having been delivered. It is clear, however, that the opinion given by the Pundit Chutterbooj directly supported the opinion of Sir W. Macnaghten, who maintained that the Vyavastha delivered by him was the real law of Bengal. Both Sir William and, I may add, Saumchurn, conceived the opinions given were correct and just opinions, and both Sir Francis Macnaghten, the elder, and Sir William, his son, admitted that if such opinions of the Pundits were warranted by Hindoo law, that the decision in the 2 S. D. A., page 202, was directly at variance with the Nudeah and other cases.

I now proceed to examine the authority of the Father and the rights of the Son, according to the Daya Bhaga and other authorities. Jimuta Vahana, when contesting the right of Sons in such property by birth as alleged by the Mitacschera, at p. 8, c. 1, pars. 14 and 15 of Colebrooke's translation, observes :—

“ 14. That is not correct, for it contradicts Menu and the rest. ‘After the death of the Father and the Mother, the Brethren, being assembled, must equally divide the patrimonial estate, for they have not power over it while their parents live.’

“ 15. This text is in answer to the question why partition among Sons is not authorized while their parents are living; namely, ‘because they have not ownership at that time.’ Moreover, Devala, p. 8, c. 1, par. 18, observes: ‘When the Father is deceased, let the Sons divide the Father's wealth, for Sons have not ownership while the Father is alive and free from defect.’ ”

Jimuta Vahana also, at p. 9, c. 1, par. 19, remarks: “ Besides, if Sons had property in their Father's wealth, partition would be demandable even against his consent; and there is no proof that property is vested by birth alone, nor is birth stated in the law as means of acquisition.” At par. 30, c. 1, pp. 13 and 14, Jimuta Vahana observes: “ Hence the texts of Menu and the rest (Devala) must be

taken as showing that Sons have not a right of ownership in the wealth of the living parents, but in the estates of both when deceased." Jimuta Vahana goes on to affirm, at p. 17, c. 1, par. 38, that two periods of partition alone exist—one, when the Father's property ceases; the other, by his choice, while his property endures. At p. 19, c. 1, par. 42, he affirms that the alleged power of Sons to make partition contrary to the will of the Father, was asserted through ignorance of express passages of law to the contrary. I here merely refer to such remarks generally, as I shall bring the passages alluded to prominently before the reader.

No instance of Sons enforcing partition in Bengal can be shown.

In the Mitacshera, four periods of partition are stated, c. 1, s. 2, par. 7, and notes thereto. Colebrooke's translation, pages 259 and 260.

According to the Moyhooka, three periods of partition are allowed, p. 83.

In Benares, according to the author of the Verimetrodaya, three periods are allowed, see Mitacshera, 260 and 261, c. 1, s. 2, in note at end of p. 260.

Even Sir William Macnaghten admits, p. 43, Vol. I., of his "Hindoo Law," that in Bengal the Father's consent is requisite to a partition.

The author of the Daya Bhaga, at p. 31, par. 27, c. 2, in examining the texts of Vyasa, observes: "It should not be alleged that a single pareener may not, without the consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family; for here also (in the very case of land held in common), as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. But the texts of Vyasa (par. 28, p. 32, c. 2), exhibiting a prohibition, are intended to show a moral offence, since the family is distressed, by a sale, gift, or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer."

Then at par. 30, p. 32, c. 2, Jimuta Vahana observes : "Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null, for a fact cannot be altered by a hundred texts."

The Daya Bhaga at par. 31, ch. 2, p. 33, observes, accordingly (since there is not in such case a nullity of gift or alienation) Nareda says, "When there are many persons sprang from one man, who have duties apart and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." It is clear from this text that the property of which an alienation is here alluded to *must refer* to property held in common, for the expression, "if they be not accordant in affairs," would have no meaning if they were entirely separate. With reference to this particular text, it will be seen from the note at p. 33 to the above text, that some parties held that such referred to separate property. This, however, is put at rest by a text of Nareda's at p. 102, 2nd Dig., which being overlooked has led to serious results.

Nareda : "If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts, for surely they have dominion over their own."

Saumchurn's observations at p. 613, octavo edition, will explain the distinction which is contended for in Bengal : "The lawyers in Bengal hold that of things inalienable the alienation of some of them is invalid and that of the rest is valid ; that is to say, gifts unfit by reason of *want of proprietary right* are necessarily null and void, but that gifts unfit because they are prohibited by general rules may be valid, though the alienation thereof is immoral or moral according to circumstances. They are as follows :—Vyavastha, 361. The alienation of deposits for delivery or use, bailments in the form of Nyasa pledges, things borrowed for use, and without a legal cause, the alienation of joint property exceeding one's own share, and of Sreedan without distress, are invalid." To which

he very correctly adds, "because of the want of proprietary right."

It will be apparent from the passages I have given from Sir William Macnaghten's work, that not merely does he deny the right of a co-partner to sell his own share in undivided property, but he alleges that an inchoate right is created by birth in Sons. The first proposition (independent of cases decided) is contradicted by the text of Nareda, 2 Dig., p. 101.

The alleged inchoate right of Sons in Bengal (I speak it with great respect) is an error into which Sir William Macnaghten has fallen.

It is noticed in Saumchurn's work, octavo edition, p. 2, in the following manner: "Sir William Macnaghten defines the cause of heritable right in these terms: 'The most approved conclusion appears to be that the inchoate right arising from birth and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle—that is, by the death of the owner (natural or civil) or by his voluntary abandonment;'" and he refers to Sreekrishna, cited in Colebrooke's Digest, Vol. II. p. 517, as his authority. This, however, is not the opinion of Sreekrishna, nor of any of the other authors of law books current in Bengal. None of them admits inchoate right arising from birth. For instance, Jimuta Vahana says: "There is no proof that property or right is vested by birth alone, nor is birth stated in the law to be a means of acquisition." (Colebrooke's Daya Bbaga, c. 1, par. 19.) Raghunandana says: "As to what is written in the Mitacshera, viz., 'By birth alone, a person having ownership takes the property;' this is a text of Goutama; so the venerable instructors maintain; that also signifies, the holy teachers maintain, that *on the extinction of the Father's right*, his Son, not any other relative, may take his property, because Sons have right to the property of their Father by the very relation of birth by which they are his issue, and which is superior to every other relation." It does not mean that Sons have right by birth in their Father's property, while his (the Father's) own

right subsists, for that would contradict Devala's text, "When the Father is deceased, let the Sons divide the Father's property, for they have no ownership while the Father is alive and free from defect (Daya-tattwa);" and Sreekristna, a follower of Jimuta Vahana, has nowhere used any expression which supports the proposition laid down by Sir William Macnaghten. On the contrary, Sreekristna, in his comment on Jimuta Vahana's *Daya Bhaga*, says: "The text of Goutama, which is cited in the *Mitaeshera*, is unauthorized, or, if it be authorized, it related to the case of one whose Father dies while the child is in the Mother's womb; else a Father, who has a male issue, would not be independent in regard to his own goods. He then subjoins an interpretation similar to that which occurs in the *Daya-tattwa*, and which is above quoted. Thus we are justified in the conclusion that Sir William Macnaghten's definition of the cause of heritable right is not according to the doctrine current in Bengal."

I have above given the various cases which establish the right of the Father to will away ancestral property in Bengal. Sir William Macnaghten, in noticing some, has omitted the case in the 4 S. D. A., p. 323, which is at variance with the doctrine contended for by him. The marginal note is: "By the Hindoo law current in Bengal, a Son has no right to the ancestral property inherited during his Father's life." A similar opinion was delivered by the Pundits in the case reported in 2 S. D. A., p. 314.

The worthy chief interpreter of the High Court, Baboo Saumchurn, at pp. 435 and 436, finds fault with Jaganatha for maintaining that if an unequal distribution be made of ancestral property, a second partition could not be requested, though the Father may be guilty of a moral offence; and Saumchurn observes: "But neither he (Jimuta Vahana) nor any of the leading authorities of the Bengal School has laid down that if the precept of law is infringed in the distribution of ancestral real property, the partition shall not be invalid. It must therefore be understood to be their opinion that unequal distribution made by a Father of property ancestral is immoral

as well as invalid." Even limiting my remarks to Bengal, these observations of Saumchurn cannot be supported; they are inconsistent with his observations at p. 2 of his work, and also with the passages I have quoted from p. 613 of his book. At p. 436, when speaking of the decision in the case, 2 S. D. A., p. 202, Saumchurn considers that it was a decision "establishing by a mass of authorities, and after an ample discussion, that unequal distribution of ancestral real property was illegal and invalid." Such a statement is clearly not in unison with the opinion of Mr. Shakespear and the five Judges as to what was decided by the Court. That the Pundits in the case in 2 S. D. A., p. 202, held such opinion is true, but that such was either in accordance with the law of Bengal, or with the opinion of Jimuta Vahana, I venture to deny, and I will point out the fallacy which pervades all the opinions when I come to examine the case itself.

Saumchurn, at p. 564, when giving the opinion of Mr. Colebrooke, which was, "that a party having a co-parcener could not give away his entire share in the joint property," observes: "This is a true exposition of the law, and ought to have been acted upon; but it was too late, numbers of wills and deeds of gift relative to the transfer of entire estates, movable and immovable, acquired and ancestral, had already been admitted and affirmed; and thereby the doctrine of *factum valet* was too deeply rooted to be shaken." And he then alludes to Mr. Colebrooke's opinion.

Even independent of the ownership of the Father, the text of Nareda, 2 Digest, 101, is decisive against the accuracy of such an opinion.

Saumchurn, in the passage I have alluded to, p. 435, appears to consider that Jaganatha has expressed a new opinion of Jimuta Vahana. This does not appear correct; Jimuta Vahana has affirmed that the Father is the entire owner of the property; and that such is the law of Bengal, the authorities which I shall cite will amply support him. He does not deny that if a Father leaves his children and family destitute, that he commits a moral offence. But he denies that such precept has any reference to the acts of a well-conducted parent who is the

absolute owner of the property, and he maintains the uncontrolled authority of the Father. As the opinion of Jimuta Vahana is questioned, let me see what the author of the *Virimitrodaya* says when giving a summary of his doctrine. Jimuta Vahana, having cited two passages of Vyasa, affirms that they are not intended to incapacitate a single coheir for making a sale or gift; since he has property defined to be a power of disposal at pleasure, in the case of immovables, precisely as in that of other effects; and since those texts cannot declare null an actual gift consisting in the relinquishment of the property; for a fact cannot be altered by a hundred texts. But the prohibition is levelled against wicked persons, and is intended to declare the alienation sinful, because it is injurious to the family, if there were no sufficient cause for the alienation, such as the distress of the family or the like, so the texts relative to separated coheirs must be explained as above. Accordingly, *Nareda* authorizes generally a sale or any other alienation. Since the text specifies the reason, "because they are masters of their own wealth, it relates to immovables, for it would else be impertinent." Daya Bhaga, c. 2, par. 31, p. 33 in note. It seems to me that the text of *Nareda*, 2 Digest 101, has been overlooked by the worthy chief interpreter of the High Court, Saumchurn, in his able treatise. It has certainly been overlooked by others. It is a text not confined to any particular school, but affirms the general right of a co-parcener to sell his own share of joint property, and is expressly admitted by the author of the *Virimitrodaya*.

The texts which I shall refer to will show that an unequal partition when made cannot be rescinded.

Independently of the passages given from the Daya Bhaga, at par. 46, c. 2, p. 40, Jimuta Vahana affirms the right of the Father to sell, give, or abandon the property.

But now let me call attention to one well-known text of *Nareda*.

Even they who are born or yet unborn, and they who are in the womb, require funds for subsistence; the deprivation of the means of subsistence is therefore *reprehended*, p. 113 2 Dig. The expression is *reprehended*. This is most im-

portant; for coupling the permission to sell the undivided share, in the text given at p. 101 of the 2nd Digest, it is abundantly clear that Nareda, in reprehending the act, does not render that which he acknowledges to be legal absolutely void.

But now let me see what the power of giving, selling, or mortgaging property necessarily involves. Both Sir Francis and Sir William Macnaghten agree in maintaining that the case in 2 S. D. A., p. 202, or at least the opinions of the Pundits, is at variance with the decisions reported in 1 S. D. A., p. 2, and 2 S. D. A., p. 42, and the other authorities. Sir Francis Macnaghten, at p. 7 of his list of decided cases, observes on the case of Bhowanychn, "A Hissenamah, or Deed of Partition, made by a Father and not carried into effect by him in his lifetime, is not binding upon the Sons after his decease. The decision is very unsatisfactory, and seems to have turned entirely on possession not having been given by the Father in his lifetime. If this be settled law, it must deprive the Hindoo of a right to dispose of his property by will. If the decision implied a denial of the Father's right to make an unequal distribution of his property among his Sons, it is directly at variance with the two former decisions." The following is a note by Sir William Macnaghten at page 3 of 1 S. D. A.:—"It becomes necessary to the consistency of the doctrine equally to maintain that a Father's irregular distribution of the patrimony at a partition made by him in his lifetime in portions forbidden by the law (Jimuta Vahana, c. 2, par. 17), shall in like manner be held valid, though on his part sinful. No opinion was taken from the law officers in this case; but it has been received as a precedent which settles the question of the Father's power to make an unequal disposition, even contrary to the injunctions of the law, whether by gift, or by will, or by distribution of shares." It will be seen by referring to the note at p. 215 of 2 S. D. A., that Sir William repeats the remark, that no opinion was taken in the case in the 1 S. D. A., p. 2, from the Pundits. This may lead to a sup-

position of neglect on the part of the Court. This is an error which I may as well rectify. If the reader will turn to pp. 262, 263, and 264, of Sir Thomas Strange's work Vol. I., ed. 1825, it will be seen that the means resorted to by the Court for information were as extensive as possible; reference being made not only to numerous Pundits of the several Courts of the provinces, as well as those of the Presidency, among whom was Jaganatha, the compiler of the Digest; and that a great majority, including Jaganatha, were in favour of the acts of the testator.

That careful and attentive Judge, Mr. Shakespear, also supposed that no opinion was taken from the Pundits in the Nuddeah case, and such must have arisen from not finding the opinion on record. This may be explained by the fact that about the time he is speaking, in 1831, such records must have been destroyed. See Saumchurn's Preface, p. 31, in note.

The right of a co-parcener in Bengal to sell his own share of undivided property at his own free will and choice is supported by the following cases: 1 S. D. A., p. 1; 3 S. D. A., note (a) p. 22; 4 S. D. A., p. 196; 6 S. D. A., Select Reports, p. 35.

Sir W. Macnaghten, Vol. I., p. 5; Vol. II., pp. 212, 220, 291, 292. Saumchurn, octavo, pp. 594, 595.

The same principle was maintained by Sir Thomas Strange under the opinion of Mr. Colebrooke, in a Madras case, pp. 78 and 79 of Strange's Notes of Cases at Madras; and such continued the law of the Madras Court, as will be hereafter noticed, for upwards of fifty years.

Indeed, Sir W. Macnaghten in a note (a) at p. 22 of 3 S. D. A., acknowledges the right of a co-parcener to sell his own share of an undivided family estate, and that on this latter point there was indeed *no difference of opinion among Bengal writers*.

Let me now see to what extent a Father may make away with ancestral property. At p. 550 of Saumchurn's work, the prohibition of gifts is declared by Yajñvalcha to be made, lest by alienation the family suffer for want of maintenance.

Vrishpati: "A man may give what remains after food and

clothing of his family, the giver of more may take honey at first, but afterwards shall find it poison."

Katayana: "Except his whole estate and his dwelling-house, what remains after food and clothing for his family, a man may give away whatever it be (whether fixed or movable), otherwise it may not be given."

Yajñwalcha: "Except his Wife and issue, a man may give away (his wealth) which does not affect the maintenance of his family; he cannot give away the whole wealth if there be issue; also what was promised to a stranger. Such texts are literally destructive to the *allegation of equal rights of Father and Son*, and directly impeach the alleged maxim of law stated by Sir William Macnaghten, above mentioned, so far as the same regards a community of interest."

At p. 549, Saumchurn observes: In partition, the power of a Father or proprietor is still the same as it was before, no change having taken place in that branch of the law. But the doctrine regarding his power of making a gift or other disposition of real property, ancestral or self-acquired, and also ancestral personal property, if the estate consisted of that alone, has of late undergone a great change. For anciently the doctrine of the law was, that a Father could not make a gift or other disposition of such property without the consent of his Sons. He then cites a passage from Yajñwalcha, on which I shall presently comment. But such a statement is not in unison with the weight of authority, and is directly at variance with Jimuta Vahana's work, which has been the law of Bengal for upwards of 400 years.

But texts of great antiquity support the right of sale or gift by a Father, 2 Dig. 118. The gift of a man's whole estate is valid, for it is made by the owner, but the donor commits a moral offence because he observes not the prohibition. —The Smṛita Sara.

In unison with this, the same principle maintained by Jimuta Vahana is supported by the Daya Crama Sangraha, at pp. 122 to 125, and the author concludes by observing: "It is thus stated in the Smṛiti Sagura and other books; therefore a gift by a

parcener of his own share of the common property is valid, whether such gift has been made antecedent or subsequent to partition. All this is in perfect consistency with the text of Nareda, p. 101, 2 Digest, and the admission of Sir William Macnaghten, in note (a) p. 22 of 3 S. D. A., that such was the undoubted law of Bengal.

Moreover, Jimuta Vahana, at p. 9, c. 1, par. 19, observes: "If Sons had property in their Father's wealth, partition would be demandable even against his consent."

Even Sir William Macnaghten admits, p. 43 of Vol. I., that in Bengal the Father's consent is requisite to partition, and that Sons, according to such law, cannot exact it except under particular circumstances. No case that I know of can be produced in Bengal of a Son successfully claiming partition with his Father.

Let me now see what the course has been where the Mitacshera prevails, with reference to the right of Sons to partition irrespective of the will of the Father. Sir Thomas Strange took the opinions of Mr. Colebrooke, Mr. Sutherland, the translator of the two treatises on adoption, and Mr. Ellis of Madras. They are given at pages 216, 217, 218, and 219 of the 2nd Vol., ed. 1825, and are as follows:—

The first case was one from the Zillah of Vendechemm.

September 9, 1807.

PENAUKA PATY APPANAUYANGER.

The Sons of a man possessing property inherited by him claim a division of it, not including the land.

The Father not assenting, can they compel one?

ANSWER.

They can compel a division of the land only according to the Daya Bhaga of Jimuta Vahana, Agee Vateva Bagum in Jaganatha turka-punchanum.

(Signed) SREENEVASA CHARLOO, Pundit.

REMARKS.

The answer is expressed too broadly. Under particular circumstances a division may be exacted by Sons against the consent of their Father.—Mitacschera, c. 1, s. 2, par. 7.

Colebrooke.

“They cannot,” certainly not; the property, barring waste, is absolute in the Father during life.

Ellis.

Zillah of Bellari, May 29, 1807.

TURCAPAH v. MULLASHIAH.

The Plaintiff is one of several Sons of the Defendant, of whom, having been turned out of doors by him, he demands his share of the family property.

Is the Defendant compellable to acquiesce in his demand?

ANSWER.

According to Yajñwalcha and others, a Father dividing his property among his Sons, must allot to the eldest a larger share than the rest, and according to Vrihaspati, the Wife shares with them, if not provided for by her parents. It is declared by Nareda, that though a Son should be earning his own livelihood, not coveting what belongs to his Father, still, on a division of property, an allotment should be made for him, if only to bar his future claim. In the case referred, the Defendant is bound to allow the Plaintiff the share he demands.

(Signed) RUNGACHARREE, Pundit.

REMARKS.

None of the circumstances which could entitle a Son to exact partition from his Father (Mitacschera, c. 1, s. 2, par. 7) appear to have existed in the present case. The opinion delivered seems contrary to the law on that point, as well as in regard to the superior share of the eldest Son, which Yajñwalcha declares to be optional with the Father in his lifetime,

but which he is restricted from granting if the property be hereditary, and which is altogether obsolete on a partition between brothers.—Mitacshera, c. 1, s. 2, par. 1 to 6, sects. 3 and 4.

Colebrooke.

“Is bound to allow the Plaintiff his share.” If he thinks proper to divide his estate, he is so bound, not otherwise. All he is bound to do during his life, is only to provide his Son with maintenance. After his death, the rejected Son may demand a partition from his Brother. A Father’s dominion over the family property is absolute so long as he does not waste it, of which the magistrate will judge in equity.

Primogeniture has no force in the present age.

Ellis.

Zillah of Bellari, May 26, 1808.

SARRABIAH V. MULLIAH.

The Plaintiff sues for a division; his Father being alive, is he entitled to it?

ANSWER.

It is declared by Hanceta, that while the Father lives the Son cannot interfere in the distribution or expenditure of money, in the making of gifts, or in the punishment of servants when they deserve it, without the consent of the Father. The present suit, therefore, is not competent.

(Signed) RUNGACHARREE.

REMARKS.

Under particular circumstances, a Son may demand partition.—Mitacshera, c. 1, s. 2, par. 7.

Colebrooke.

Can the Sons among the Zillah of Ganjam, Wooddy

Bramins, enforce a division of the family property during the life of their Father?

ANSWER.

It depends upon whether the property descended from ancestors; in this case they may; otherwise if it were acquired by the Father.

REMARKS.

Sons have a right in particular cases only, to demand a partition, even of ancestral property, during their Father's lifetime.—See Mitacshera, c. 1, s. 2, par. 7.

Sutherland.

I will now proceed to show that the opinions of the parties above given are supported alike by the decisions of the late Sudder Dewanny Adawlut of Calcutta, and also by the Sudder Adawlut of the North-West Provinces.

The first case is Chuter Daree Lall v. Bikao Lall, p. 282 of S. D. A. Reports of 1850. Present—Sir R. Barlow, W. B. Jackson, and John R. Colvin, Judges.

At page 284, the Court in judgment observe “that it was pleaded that a Father and Son possess an equal right in immovable property (see page 75, 2 S. D. A., Sham Sing, Appellant, v. Mussumut Omrootee, Respondent), and it is argued that as the Father, by making this sale, has divested himself by his own act of his right, the Plaintiff is the only legal claimant to the property in suit. On these points we have to observe that a suit for possession and mutation of names, as on an exclusive proprietary right, is the suit before us, not a suit to declare the sale by the Father of ancestral property, without consent of the Son, to be illegal; we are clearly of opinion that, during the Father's life, the Plaintiff cannot institute such an action as is now brought. We therefore reverse the decision of the Lower Court, and give judgment in favour of the Appellant, with costs. The Respondent's pleader has produced a precedent in support of his case: see page 175 of Sudder decisions of 1845, wherein it was ruled by

a single Judge (Mr. Rattray) that a plaint similar to the present is admissible, and a decree in concurrence with that was passed for the Plaintiff. We cannot, however, concur in the principle of that decision."

The next case is reported at page 352, S. D. A., of the 15th of May, 1851, Mr. John Colvin sitting alone.

This suit was instituted by the Plaintiff for the possession and registration of his name in the collector's office as proprietor of a portion of an estate. The Plaintiff sues as heir of his Father, who had, against the law of Mitilha, which requires the consent of a Son in such cases, alienated by his own act the property claimed. The suit was brought within twelve years from the date of the Father's death, but more than twelve years from the time of sale. The Principal Sudder Ameen dismissed the suit on the ground of limitation, because he thought the cause of action arose when the sale was made. Certainly a cause of action may have arisen at the time of the sale; that is, it is possible that a suit could have been brought by the Plaintiff during his Father's lifetime, namely, for the purpose of declaring the sale invalid. But he could not have brought the present action, which is for possession and registration of name in the collector's office as full proprietor till his Father's death. A recent decision of the full Bench (of the 11th June, 1850) has laid down "that it is not competent to a Son, even in provinces where the law of the Mitacshera prevails, to bring a suit for possession of an ancestral estate, and mutation of names as on an exclusive proprietary right, during the lifetime of his Father, on the ground that the Father had made an illegal alienation of the estate by sale without the Son's consent." The precedent applies exactly to the suit; the Plaintiff's cause of action as respects his claim to proprietary possession could have arisen only when his Father died, and limitation can be calculated against this claim only from that period. For these reasons the decision of the Principal Sudder Ameen is annulled, and the case remanded for award on the merits.

The next case is one taken from the Sudder Dewanny Reports of the North-West Provinces, of 8th December, 1857. Present—

Judges Begbie, Deane, and Brown. *Radey Tewaree v. Baboo Burtpursaud and others.* A special appeal was admitted to try whether the Plaintiffs could sue to obtain possession of the ancestral estate during the Father's lifetime. The Court were unanimously of opinion that the suit of the Plaintiffs, which was to obtain possession of hereditary property alienated by their Fathers, who are living, and who are made Defendants in this case, cannot be maintained.

The next was a case reported of the 14th July, 1852, p. 312, *Sudder Reports North-West Provinces.* Present—A. Begbie, S. Brown, and H. B. Harrington. *Peer Buksk Khan v. Ramdoss and others.*

The Court, after reading the last case, observed that the precedents have expressly ruled that a suit by a Son during the lifetime of his Father to obtain possession of an hereditary estate with registration of names, on the ground of illegal alienation, cannot be entertained, and they are unanimously of opinion that the same principle must be held equally to apply to the present suit.

The title of the Plaintiff to obtain possession of a portion of the estate in dispute, with the registry of his name, being in like manner contingent and dependent upon the death of the gooroo, or spiritual teacher, during the whole lifetime, therefore, on his own showing, he can have no claim to succeed.

The next case, which came before the same Judges, was the case of *Pursun Lall v. Ramdeen Lall and others, Respondents*, reported at page 365 of 31st July, 1852, *Sudder Reports North-West Provinces.* A special appeal was admitted to try whether, with reference to authoritative precedents, the Plaintiffs were competent to institute a suit for the recovery of possession of an estate mortgaged during the life of their Father. The Judges were unanimous in opinion that, with reference to precedents, the suit of the Respondents to obtain possession of hereditary property alienated by the Father (who is still living, and who has been made a Defendant in the suit) cannot be entertained. The present is a suit for possession and mutation of

names, on exclusive proprietary right, as is evident from the fact of the Defendant's Father having been made one of the Defendants. It is not a suit simply to declare the sale by a Father of ancestral property, without the consent of his Sons, illegal; on this ground, therefore, the Court feel themselves compelled to reverse the decision, both of the Principal Sudder Ameen and the Judge (who have with contrary results decided the case on its merits) and to dismiss the Respondent's suit.

The next case was one tried before the same three Judges, at page 87 of the 21st February, 1853, Reports North-West Provinces. It was the case of Sheodepul, Appellant, Defendant, v. Tukoo Tewarry and others, Plaintiffs, Respondents. The marginal note is, "A suit to obtain possession of a paternal estate during the lifetime of the Plaintiffs' Father on the ground of the invalidity of the conveyance made by the latter is not maintainable, and the decree in favour of the Plaintiffs in the Lower Courts was reversed on this ground."

There is another decision at page 761 of the same volume, of date the 6th December, 1853, before the same three Judges.

The marginal note is, "There is no bar to the entertainment of a suit for the invalidation of an adoption during the lifetime of the adoptive Father, when the object of the suit is not for possession, but merely for declaration of title. The Court at large were of opinion that there was no bar to such a suit, and that the previous decision of the Court, in which a ruling was held, related to suits which had been brought by Sons during the lifetime of their father for an exclusive possession and proprietary title in their own right, as well as for the avoidance of the conveyances executed by the Father."

The author of the *Daya Bhaga* maintains, at paragraph 42, page 19, and at paragraph 8, page 25, of Colebrooke's translation, not merely that Sons have no right to any part of the estate during the life of the Father, but that without the Father's consent they cannot enforce partition.

The following are the authorities which support his opinion :—

"Three persons, a Wife, a Son, and a Slave, are declared by

law to have no wealth exclusively their own ; the wealth which they may earn is acquired for the man to whom they belong." Menu, c. 8, s. 416. I have given this text without the gloss of Calluca.

The same text is given by Nareda, 2 Digest, 249. Three persons, a Wife, a Slave, and a Son, have in general no wealth exclusively their own ; the wealth which they may gain is regularly acquired for the man to whom they belong.

This text is also given in the Chintimani, p. 92.

"After the death of the Father and the Mother, the Brothers, being assembled, may divide among themselves, in equal shares, the paternal and maternal estate ; but they have no power over it while their parents live, unless the Father choose to distribute it."—Menu, c. 9, s. 104.

"After the death of the Father, Sons may divide his estate, but they have not ownership or full dominion while a faultless Father lives."—Devala, 2 Digest, 522.

"The Father being degraded, or become an anchorite, or having resigned, his Sons may divide his estate."—Nareda, 2 Digest, 522.

"Since partition of the estate takes place after his decease, Sons cannot divide it while the Father lives, *even though it were acquired by them independent of him* ; they have no power to make such a partition, since they are not their own masters in respect of wealth or religious duties."—Sancha and Lichita, 2 Digest, 526.

"While the Father lives, Sons are not independent in respect of the receipt, alienation, and recovery of wealth ; but if he be prodigal, absent in a remote country, or afflicted with disease, let the eldest manage the affairs."—Hareeta, 2 Digest, 527.

"Should the Father be incapable, let the first-born manage the affairs, or the next, if experienced in business, if the Father assent ; not without the Father's assent can partition of the property be made. If he be old, or his faculties be impaired, or if he be afflicted with a chronic disorder, let the eldest Son, like a Father, protect the property of the rest. Truly the sup-

port of the family depends on the patrimony. Sons who have parents living are not independent, nor even after the death of their Father, while their Mother lives."—Sancha and Lichita, 2 Digest, 533.

"While the Father lives, the estate may be divided with his consent, openly, in the presence of arbitrators, or privately, by a mutual adjustment according to law."—Sancha and Lichita, 2 Digest, 536. In note, "*With his consent*—with the consent of the Father."—Chandeswara.

But now let me see how far Sons are bound by a partition made by their Father.

"Sons to whom equal or less or greater shares have been allotted by their Father should maintain such distribution, otherwise they shall be chastised."—Vrihaspati, 2 Digest, 547.

"Whether the Father distribute equal shares to his Sons, or give more wealth to some and less to others, according to circumstances, such shall be their shares, for the Father is Lord of all."—Nareda, 2 Digest, 547.

"If a Father make a partition among his Sons, he may give at his pleasure more to some and less to others.—Yajñvalcha, 2 Digest, 539.

"The distribution made by the Father is declared binding on the Sons, among whom an unequal division has been made."—Yajñvalcha, 2 Digest, 548.

"Or even a Father advanced in years may himself divide the estate among his Sons, giving to the first-born the best portion, or in any mode he shall choose."—Nareda, 2 Digest, 538.

"A Father has no power, if his intellect be disturbed by sickness, or his mind agitated by wrath, or his affection partly set on the Son of a favourite Wife, *to make a partition different from the law of inheritance.*"—Nareda, 2 Digest, 541.

To what extent a man may give away or sell ancestral estate, I have already cited the texts of Vrihaspati, Katayana, and Yajñvalcha, from Saunichurn, octavo edition, p. 550.

Moreover, according to Nareda, 2 Digest, 101, "If they

severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts, for surely they have dominion over their own."

The gift of a man's whole estate is valid, for it is made by the owner: the donor commits a moral offence because he observes not the prohibition. (Smriti Sara, 2 Digest, p. 118). The existence of this text is shown at p. 73 of the Chintimani, where it is thus quoted: "According to the author of the Smriti Sara, the gift of the whole wealth of a man is valid if he be the sole owner of it. But such a man commits wrong by doing a prohibited act."

See also the Daya Crama Sangraha of Wynch, pp. 122 to 125.

Nothing can be stronger than the authorities above given. While on the subject of partition, I may as well allude to an observation of Sir William Macnaghten, at pp. 43 and 44 of his first volume, where he remarks that the law, as current in Benares and the other Schools, differs widely from that of Bengal in respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the Sons, *if the Mother be incapable of bearing more Sons*, even though the Father retain his worldly affections, and though he be averse to partition; and for this he cites the Mitacshera, c. 1, s. 2, par. 7, and which passage ends by quoting an alleged text of Sancha, which is refuted by the various texts above quoted, and which text of Sancha I will subsequently notice.

That Sons by the law of Benares can enforce a partition against the will of the Father, except in particular instances, seems hardly sustainable. Luckily the text of a leading authority at Benares is at hand. If the reader will turn to the note at c. 1, s. 2, par. 7, p. 260, of the Mitacshera, he will find what the author of the Virimitrodaya observes: "We hold that while the Father survives, and is worthy of holding uncontrolled power, his will alone is the cause of partition. If he be unworthy of such power, in consequence of degradation, or of retirement from the world, or the like, the Son's will is likewise a cause of partition. But in the case of his decease, the successor's own choice is of course the reason. By this mode

the periods are three, else there must be great confusion in the uncertainty of subject and accident, if many reasons, as extinction of worldly propensities and so forth, must be established, collectively and alternately. Thus the mention of certain reasons in some texts, and the omission of them in others, are suitable; for the extinction of the temporal affections and the other assigned reasons *indicate the single circumstance* of the Father's want of uncontrolled power, since it is easy to establish that single foundation of the texts.

It is remarkable how this bears out the opinion of Jimuta Vahana.

It is very singular that neither Mr. Colebrooke nor Sir William Macnaghten ever refer to par. 8, c. 1, s. 5, of the Mitacshera, p. 279, quarto edition, by Colebrooke. If the passage there given were a true and correct statement of the law, he (Mr. Colebrooke) would have referred to it, and given a contrary opinion to that above referred to. Sir William Macnaghten, too, instead of quoting c. 1, s. 2, par. 7, of the Mitacshera, which shows only a conditional power to partition, had only to refer to par. 8, at p. 279, as authorizing such at any time by the mere will of the Son, irrespective of any qualification. It is manifest that neither Mr. Colebrooke nor Sir William Macnaghten could have entertained any doubt that par. 8 was absolutely unwarranted.

But how are we to explain the allegation of equal rights of Father and Son in real ancestral estate? With reference to such, Jimuta Vahana observes, p. 25 of Colebrooke's translation, c. 2, par. 9:—"The text of Yajñwalkya, "The ownership of the Father and Son is the same in land which was acquired by his Father, or in a corrody, or in chattels," properly signifies, as rightly explained by the learned Udyota, that when one of two Brothers whose Father is living, and who have not received allotments, dies, leaving a Son, and the other survives, and the Father afterwards deceases, the text declaratory of similar ownership is intended to *obviate the conclusion* that the surviving Son alone obtains his estate, because he is next of kin. As the Father has ownership in the Grandfather's estate, so

have his Sons, if he be dead. There is not in that case any distinction founded on greater or lesser propinquity, for both equally confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies. Such is the author's meaning. Then, at par. 10, he alludes to the Great-grandson as being in like manner an equal claimant. At the 11th par., he shows that if parties had ownership by birth, a share should be given to them. Then, at par. 12, he remarks on the explanation he had given, thus:—

“It should not be objected that such cannot be the meaning of the text as not being the subject premised, for the case of Grandsons by different Fathers was the proposed subject. Now turn to c. 1, s. 5, of the Mitacshera, and the reader will find it headed, ‘Equal Rights of Father and Son in Property Ancestral.’”

Now this expressly bears out the remark of Jimuta Vahana at par. 12, p. 16; for in c. 1, s. 5, of the Mitacshera, headed as above, the first paragraph states, “The *distribution* of the paternal estate among Sons has been shown.” The author next propounds a special rule concerning the *division* of the Grandfather's effects “among Grandsons by different Fathers; the allotment of shares is according to the Father's” (par. 2). Although Grandsons have by birth a right in the Grandfather's estate equally with Sons, still the distribution of the Grandfather's property must be adjusted through their Father's, and not with reference to themselves. The meaning here expressed is this: that if unseparated Brothers die, leaving male issue, and the number of Sons be unequal, one having two Sons, another three, and a third four, the two receive a single share in right of their Father; the other three take one share, appertaining to their Father; and the remaining four similarly obtain one share, due to their Father. The illustration last given is actually decisive against assuming a community of interest from the mere circumstance of birth, for if such a principle were true, the Grandsons would take shares along with their Fathers.

It is very singular that the remarks of Jimuta Vahana, on

the passage from the Mitacshera, at c. 1, s. 5, par. 3, have passed either unnoticed or misunderstood. If the reader will turn to c. 2, par. 9, p. 25, in the note to par. 9 it is observed, "It is not agreed who is the author here cited by Jimuta Vahana." The commentator Chudamaini says, "Some author or compiler so named." Maheswara retains the name exhibited in the text, and calls him Udyota, but Sreechristna hints that his appellation is Divacara, while Achyuta interprets the phrase as commendatory of an unnamed writer; and Raghimandana, or the commentator who has assumed his designation, intimates that the author himself has here delivered his own doctrine.

It will be seen, from the residue of this note, at p. 25, that the text of Yajñwalcha is similarly expounded in the Dayatatwa: "In regard to land, a corrody, or slaves, though acquired by the Grandfather, as the Father has the property of them in right of his being the person who presents the funeral oblation at solemn obsequies, so, if his property cease by death or other cause, his Sons have a right, *though their Uncle survive*, to so much as should have been their Father's share." It is clear that the author of the Dayatatwa is referring to the same text which Jimuta Vahana explains, and it is equally clear that Jimuta Vahana's remarks apply to the Mitacshera.

It seems to me, under the authorities which I have already cited, that the proposition is not true with reference to co-ordinate ownership of Father and Son. Even Sreechristna does not appear to understand the remarks of Jimuta Vahana, for he copies the text of Yajñwalcha from the Mitacshera without the explanation given by the Daya Bhaga. If Sreechristna maintained that making over ancestral property at the will of the Father, in the passage above mentioned, was absolutely void, he would be open to a charge of inconsistency, for he supports the entire ownership of the Father, and maintains that so long as the Father, the owner of the ancestral property, continues to survive, it is impossible his Sons should have ownership therein.—Daya Crama Sangraha, p. 96.

This text, cited in the Mitacshera, has been quietly copied

into the *Moyhooka*, at p. 57, without the explanation of the *Daya Bhaga*. Sir W. H. Macnaghten has also taken the text cited by the *Mitacschera*, at p. 46, as establishing equal rights of Father and Son in real property ancestral; though this is inconsistent with his alleging an inchoate right in the Son, and also with the limitation of the Son's right to partition when the Mother is incapable of bearing more children. Co-ordinate ownership of Father and Son is actually ridiculed by *Jimuta Vahana* in pars. 48, 49, 50 of c. 2, pp. 41 and 42, quarto edition; and the reader will see, from par. 52 of c. 2, p. 43, that he holds to his explanation of the passage in *Yajñwalcha* by referring to his preceding remarks on the *Mitacschera's* misapplication of the text.

The case given in the *Mitacschera* was the case of a Grandson who takes by right of representation ancestral estate.

It was a mere question on whom the inheritance should devolve, and had nothing whatever to do with the question of community of interest. This will be more particularly shown when I examine the authorities cited by the Pundits in the case in 2 S. D. A., p. 76.

The alleged equal dominion of Father and Son, if applied to a community of interest, is not supported by authority, and is in direct opposition to the text of *Nareda*. Even *Yajñwalcha* observes, "that precious metal or stones, pearls, coral, and other movables, the Father has power to give or sell the whole; but neither the Father nor the Grandfather shall alien the whole of his immovable property." If equal dominion was maintained as creating a community of interest, the word whole should be read as interdicting any assignment of any portion of his real ancestral property, which clearly was not the intention of the writer.

If the text of *Yajñwalcha* were to be taken as establishing community of interest of Father and Son, the Sons would be entitled to claim partition, as *Jimuta Vahana* observes. But now let me examine what is maintained by the *Mitacschera*. At p. 258 of *Colebrooke's* translation, c. 1, s. 2, par. 1, he observes: "At what time, by whom, and how partition may be

made, will be next considered." Explaining those points, the author says: "When the Father makes a partition, let him separate his Sons (from himself) at his pleasure, and either (dismiss) the eldest with the best share, or (if he choose) all may be equal sharers."

"2. When a Father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two, or more Sons."

Then, in alluding to a certain unequal distribution, at par. 6, p. 259, he remarks: "6. This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his Father, an unequal partition at his pleasure is not proper, for equal ownership will be declared." Now let the reader turn to p. 278, c. 1, s. 5, par. 7, where he observes (speaking of the text just given): "When the Father makes a partition (s. 2, par. 1), it relates to property acquired by the Father himself. So does that which ordains a double share."

Let me now see what Jimuta Vahana says on this subject. At p. 25, c. 2, par. 8, when he is alluding to the various authorities which negative the right of Sons to force a partition, he observes: "These texts declaratory of a want of power and requiring the Father's consent, must relate to property ancestral, since the same authors have not separately propounded a distinct period for the division of an estate inherited from an ancestor. Besides, at c. 2, par. 55, p. 43, Jimuta Vahana observes: "The allotment of two shares to the Father is not properly applicable to his own acquired wealth, as appears from the circumstance that the distribution of it follows his choice. The precept regarding that allotment would be superfluous, since he may at his choice have either more or less than two or three shares." Again, at p. 52, par. 81, c. 2, Nareda says: "The Father being advanced in years, may himself separate his Sons, either dismissing the eldest with the best share, or in any manner his inclination may prompt." At the same p. 52 of the Daya Bhaga, par. 82, it is observed: "The unequal distribution here intended appears evidently to be different from that which

consists in giving the best share to the first-born." Since the author, having noticed the allotment of the best share to the eldest, again says, "or as his inclination may prompt;" thereby distinctly authorizing any unequal distribution which the Father, for reasons before mentioned, may think proper to make.

It is abundantly clear that this text of Nareda must refer to ancestral estate. Moreover, the text of Nareda, given at page 43 of 3 Digest, a Father, making partition, may reserve two shares for himself: on this Jaganatha remarks, "That a Father, dividing the estate, may reserve two shares in his own right." This text not being applicable to his own acquired property, for which it is already provided that he may keep the greater part and remain in his house, must relate solely to wealth inherited from the Grandfather.

A text of Vrihaspati, also seems to put this matter beyond dispute, for he observes, page 44, 3 Digest: "The Father who during his life divides the land which his own Father left him, may himself take twice as much as each of his Sons."

The late Chief Justice of Madras, at page 77 of Mr. Stokes's Report of the High Court, observed, that he felt a difficulty in reconciling c. 1, s. 2, par. 7, of the Mitacshera with the 5th section of the same chapter. It seems to me that it is utterly impossible to do so, because if you specify particular instances in which a Son may demand partition, you impliedly negative the general right contended for.

The worthy Chief Justice to whom I have alluded very correctly observes, that no one could read the passage from Sir Thomas Strange's work on Hindoo law without coming to the conclusion that the opinion of the author was, that—except in the instances he gives, namely, of civil death by entering into a religious order, and of degradation, making a forfeiture of civil rights—Sons could not compel a partition.

At par. 7, pages 259 and 260, after showing the four periods of partition, he ends the paragraph with these words: Sancha declares, "Partition of inheritance takes place without the Father's wish, if he be old, disturbed in intellect, or diseased."

Now the passage at par. 7, pages 259 and 260, cannot possibly refer to his acquired wealth, for not only is there an allusion to the marriage of Daughters, and to the Mother being past child-bearing, as authorizing partition, but in par. 8, immediately following, there is a direction that, on the Father making the allotments equal, the Mother shall have an equal share; and it is only on an equal partition being made in the lifetime of the Father that the Widow obtains a share in the ancestral estate. This is clear even from the Mitacshera itself, at page 285, c. 1, s. 7, pars. 1 and 2, where also the author proclaims the Mother's right on Sons dividing the estate after the Father's death. This fixes it as applying to the ancestral estate, by not merely authenticating the Mother's right on an equal partition by the Father in his lifetime, but further declaring her right on a division between the Sons after his death.

If anything were wanting to show that the texts alluded to apply to ancestral property, the author of the Retnacara Chundeswara, at page 21 of 3 Digest, observes: "Where the Father allots equal shares to his Sons, his Wives must also have equal shares; *and this is true where the patrimony inherited from the Grandfather is divided.*"

But now let me examine the words of par. 1, page 258, c. 1, s. 2: "When the Father makes a partition, let him separate his Sons (from himself) at his pleasure, and either (dismiss) the eldest with the best share, or (if he chooses) all may be equal sharers." What does this imply? It is a separation, not a continuing in joinder. The eldest is not only separated, but *dismissed*; any gift of his own acquired property would not break the union of the joint family. The author of the Mitacshera at page 278, par. 7, c. 1, s. 5, attempts to answer the various texts which I have cited, denying the right of Sons to enforce partition against the will of the Father, with what success the reader will determine.

I now approach par. 8, c. 1, s. 5, page 279: "Thus, while the Mother is capable of bearing Sons, and the Father retains his worldly affections, and does not desire partition, a distribu-

tion of the Grandfather's estate does nevertheless take place by the will of the Son."

It is very singular that Sir William Macnaghten does not even allude to this extraordinary passage; he places the right to partition on the fact of the Mother being beyond child-bearing; he need not have troubled himself with the text to which he refers, if this text had any validity; not only is it unsupported by authority, but it is actually contradicted by the four periods of partition given by the Mitacschera itself.

Moreover, the passage is opposed even by the text attributed to Sancha, given by the Mitacschera at pages 260 and 261, c. 1, s. 2, p. 7: "That partition of inheritance takes place without the Father's consent, *if he be disturbed in intellect or diseased.*" Such a text, even if true, would contradict par. 8 of c. 1, s. 5, page 279. But with reference to the passage attributed to Sancha, it is not only contradicted by the passages I have read from Sancha and Lichita, but even by the Chintamani. This last writer, at page 226, gives the text of Sancha thus: "Partition does not take place if the Father does not desire it, when he is old or in his dotage, or is afflicted with disease." The attempt of the author to make the text apply only to property independently held by the Father, is purely idle, because dividing his own property would not sever the joint status of the family.

The numerous texts which declare that Sons are bound by a partition made by the Father, are clearly applicable to ancestral estate, and stand in the way of the Mitacschera, at par. 10, c. 1, s. 5, page 279.

But I shall have more to say regarding this par. 8, at page 279 of the Mitacschera, in examining some decided cases.

Both Saumchurn and Sir William Macnaghten appear to consider that the text of Jimuta Vahana, that a fact could not be altered by a hundred facts, was the only authority for maintaining the doctrine of *factum valet*; but that is not so, for Jimuta Vahana expressly maintains that the entire ownership is in the Father. Saumchurn, at page 551, goes on to remark: "It was on the ground and plea of this passage that

gift or other disposition of the whole of ancestral property, though illegal and sinful, was declared valid by some Pundits who flourished at that time, and their opinion was followed by the then dispensers of justice, who had no means of acting independently of the Pundits. Thus the doctrine of '*factum valet quod, fieri non debuit*,' was introduced into our country with regard to alienation by males of any description of property, whether ancestral or acquired, real or personal, and it has been prevailing ever since." The charge against the Courts, so far as Bengal is concerned, is clearly unwarranted, and the opinions of Jaganatha and Jimuta Vahana as to the power of alienation, are amply sustained by the texts I have above cited. Sir William Macnaghten appears to have forgotten that, according to the law of Bengal, the Father is the entire owner of the property, and that no actual right is vested in the Sons.

This mistake has been accurately pointed out, as I have before observed, by Saumchurn, at page 2 of his work; but he does not appear to have followed out the consequences which arise from showing that Sons have no inchoate right; for, at pages 435 and 436, he appears to think, that by Bengal authorities, unequal distribution of property ancestral is immoral as well as invalid. Such opinion, however, was not held by Jaganatha or by Jimuta Vahana. The text of Nareda, to which I have so frequently alluded, is decisive in support of the decision of the five Judges of the Sudder, approved by the three Judges of the Supreme Court, on the right in Bengal to will away ancestral property. And Sir William Macnaghten himself, in the notes to the case 1 S. D. A., page 3, and also to the case in 2 S. D. A., page 215, expressly admits that the case in the 2 S. D. A., page 202, was in direct opposition to the former cases establishing the right of the Father to will away ancestral property. Moreover, the various texts which have been cited conclusively show that even where a Father makes an unequal distribution, the Sons are bound to submit to it. This of itself would show that the act would not be a void act. I noticed the remarks made by Saumchurn at pages 435 and 436, where he observed that an unequal partition would

be void. In addition to such statement at page 436, he observes, speaking of the case in the 2 S. D. A., page 205 : "That in such case it has been established by a mass of authorities, and determined after an ample discussion, that unequal distribution of ancestral real property was illegal and invalid. This, at least, was not the opinion of the five Judges of the Sudder, who declared the absolute right of the Father in Bengal to dispose of his property, real and personal, ancestral and acquired, according to his own pleasure ; and such a decision, if supportable, necessarily involves, as is admitted by Sir William Macnaghten, a right to distribute as he pleases. The five Judges of the Sudder, moreover, maintained that the case, 2 S. D. A., page 205, did not decide such question, as erroneously supposed by Sir William Macnaghten. But I will now direct my attention to the opinion given by the Pundit Chutterborj. I throw aside the fact that, in another exposition of the law, he delivered a Vyavastha directly contrary to what he gave in the case in question. The following is a copy of his opinion :— "The Deed specifies two descriptions of property, viz., ancestral immovable property, and acquired property, real and personal. Now, because no mention occurs in the Daya Bhaga or other law tracts of the legality of an unequal distribution of ancestral immovable property beyond the authorized deductions of a twentieth, half a twentieth, &c., because a Father has not unlimited discretion with respect to ancestral immovable property, and because, where the Daya Bhaga upholds the validity of a prohibited gift or sale, it is always understood, as a proviso, that the donor be vested with power to make such a transfer,—an unequal distribution (over and above the authorized deductions above alluded to of ancestral immovable property) cannot be maintained as valid. If the Father make an unequal distribution among his Sons of his own acquisitions, his motive must be looked into. If he were actuated by the desire of giving more to one Son as a token of esteem on account of his good qualities, or for his support on account of a numerous family, or through compassion by reason of his incapacity, or through favour by reason of his piety,

such distribution is valid, and must be upheld. But if such distribution be made by the Father through perturbation of mind, occasioned by disease or the like, or through irritation against any one of his Sons, or through partiality for the child of a favourite wife, it cannot be upheld; and the reason is because it is not only not conformable to law, but because it does not fall under the provision of the *Daya Bhaga*, making a gift valid even though prohibited, as that provision pre-supposes a power in the donor; and as a Father, under the circumstances above mentioned, has been declared to have no power in the distribution of the estate, the law looks upon a Father making an unequal distribution as having been influenced by one or other of the motives above enumerated; and, in the absence of any apparent legal motive, it must be presumed that he was influenced by a motive under the impulse of which the law considers his acts invalid."

If this were a correct exposition of the law, the text of *Nareda*, to which I have alluded, would be a nullity. The Pundit appears to have overlooked the fact that, according to the law of Bengal, the Father is the owner of the estate; and this is expressly maintained by *Jimuta Vahana*. This matter, moreover, when duly considered, is a complete answer, connected with the texts of *Nareda*, 2 Digest, 101, to the reproach levelled against the Judges at pp. 551 and 552 of *Saunichurn's* work, where, in speaking of the passage in the *Daya Bhaga* which declares that "the gift or transfer is not null, for a fact cannot be altered by a hundred facts," he observes: "It was on the ground and plea of this passage that gift or other disposition of the whole of ancestral property, though illegal and void, was declared valid by some Pundits who flourished at that time; and their opinion was followed by the then dispensers of justice, who had no means of acting independently of the Pundits. Thus the doctrine of '*factum valet quod, fieri non debuit*,' was introduced into our country with regard to alienation by males of any description of property, whether ancestral or acquired, real and personal, and it has been prevailing ever since." This can only refer to *Jaganatha*, and to the opinion given by him

in the Nudeah case. This is not a true exposition of Jimuta Vahana's opinion, but is a repetition of the same fallacy which found its way into Sir William Macnaghten's work.

Jimuta Vahana was far too able a man to maintain that an act being done legalized the act itself: what he maintained was this, that the Father was the absolute owner of the property, and that Sons had no right whatever during the life of the Father.

For 400 years this has been the law of Bengal, as maintained by Jimuta Vahana. There has been no new introduction of the law, and, so far as Bengal is concerned, the Judges have supported the accuracy of the doctrines maintained by him.

Not the least extraordinary part of the Pundit's opinion is his quoting the Daya Bhaga in support of his opinion. Let me explain this. Jimuta Vahana, at par. 9, c. 2, p. 25, denies that Sons have equal ownership with the Father, and explains, as I have before mentioned, the text of Yajñvalcha. At pars. 15 and 16, p. 27, Jimuta Vahana observes, "or the meaning of the text (of Yajñvalcha) may be as set forth by Daneswara: a Father occupied in giving allotments at his pleasure has equal ownership with his Sons in the paternal Grandfather's estate. He is not privileged to make an unequal distribution of it, at his choice, as he is in regard to his own acquired wealth."

16. So Vishnu says, "When a Father separates his Sons from himself, his will regulates the division of his own acquired wealth. But in the estate inherited from the Grandfather, the ownership of Father and Son is equal." At par. 17, he observes: "This is very clear. When the Father separates the Sons from himself, he may, by his own choice, give them greater or less allotments, if the wealth were acquired by himself; but not so if it were property inherited from the Grandfather, because they have an equal right to it. The Father has not in such case an unlimited discretion."

At par. 18, he observes: "Hence, since the text becomes pertinent by taking it in the sense above stated, or because

there is *ownership* restricted by law in respect of shares, and not an unlimited discretion, both opinions, that the mention of like ownership provides for an equal division between Father and Son in the case of property ancestral, and that it establishes the Son's right to require partition, ought to be rejected." In this case, Jimuta Vahana used the argument of others with reference to the ownership being restricted, as a means of showing that the alleged equal dominion of Sons had no existence. Not that Jimuta Vahana admits a Son's right to partition, which his entire work contraverts. The whole of the Pundits whose opinions are given in the case of Bowanychurn, 2. S. D. A., p. 205, assume, in direct opposition to the opinions which I have given of Jimuta Vahana, that the Daya Bhaga supports them. Now, the uniform series of decisions which show that a co-sharer of undivided landed estate may sell his undivided share in Bengal, is distinctly opposed to the principle they are supporting; and even Sir William Macnaghten himself admits that such power of sale of ancestral real estate would be inconsistent with limiting his right of distribution, 2. S. D. A., p. 215, in note.

There never was any doubt that Menu, who affirms the absolute power of the Father over the property, directs in certain cases equal division, but there was no intention to lessen the authority of the Father. The following is the only case where there is any positive interdiction regarding division (c. 9, s. 215):—"If, among undivided Brethren living with their Father, there be a common exertion for common gain, the Father shall never make an unequal division among them when they divide their families." This authority, as the Chintimani observes, p. 235, "is applicable to the case of property which is gained by the equal exertions of all the Brothers." With respect to the observation of Chutterborj, that no mention occurs in the Daya Bhaga or other law books of the legality of an unequal distribution of ancestral immovable property beyond the authorized deduction, such a statement is utterly unwarranted alike by the Daya Bhaga and by the texts of various legislators:—First, by the text of Nareda, 2 Digest, p. 101, which

gives him authority to sell his undivided share. Secondly, by the text of Nareda, given at par. 81, c. 2, p. 52, of the Daya Bhaga: "The Father being advanced in years, may himself separate his Sons, either dismissing the eldest with the best share, or in any manner as his inclination may prompt." At par. 82, in commenting on the above text, Jimuta Vahana observes: "The unequal distribution here intended appears evidently to be different from that which consists in giving the best share to his first-born," since the author, having noticed the allotment of the best share to the eldest, again says, "or as his inclination may prompt;" thereby distinctly authorizing any unequal distribution which the Father, for the reasons before mentioned, may think proper to make. Thirdly, the various texts of the inspired Legislators, which show not merely that such unequal partition may be made, but that Sons *are bound to submit to such when made*. I may shortly refer to those which I have already set out at length: Vrishpati, 2 Digest, p. 547; Nareda, 2 Digest, p. 547; Yajnwalcha, 2 Digest, pp. 539 and 548.

Chutterborj quotes also Sreekristna, who certainly cannot assist him, for he maintains the absolute power of the Father to sell the property, whether divided or undivided. (See pp. 122 to 125.)

Moreover, both Sir Francis Macnaghten and his son, Sir William, agree in opinion, that such case of Bhowanychurn, if it denied the Father's power of distribution, would be inconsistent with the decisions allowing a Father to will away ancestral property. The right of the Father to sell, give, or abandon the property, is expressly maintained by Jimuta Vahana at par. 46, c. 2, p. 40. Moreover, the course of practice in Bengal alluded to by Mr. Shakespear, of Fathers selling and mortgaging their estates, which has continued for centuries, together with the power of granting leases in perpetuity given by Regulation 18 of 1812, and the authority to create Putnee Talooks by Regulation 8 of 1819, s. 3, are actually decisive against the opinion of Chutterborj as to any limitation of the Father's power in Bengal.

The text of Vishnu, at pp. 538 and 539, 2 Digest, which

alleges equal dominion of the Father and the Son in landed property left by a paternal Grandfather, must receive the same explanation as was given by Jimuta Vahana to the text of Yajñwalcha, par. 9, c. 2, p. 25. If such text was intended to show a community of interest along with the Father, it is contrary to the various authorities I have cited from Menu downwards.

The text of Yajñwalcha has been taken as showing a community of interest in Father and Son. Jimuta Vahana, as I have observed, denies such, and shows that the discussion in the Mitacshera did not arise on any question of community of right, but was a mere question in what manner the inheritance should descend. The accuracy of Jimuta Vahana's remarks will be amply sustained by an examination of the Pundits' opinions given in the case of Sham Sing v. Mussumat Umraotee, reported in the 2 S. D. A., p. 74. The marginal note is, "By the Hindoo law current in Mitilha, a Father cannot give away the whole ancestral property to one Son, to the exclusion of his other Sons." This was the case of a verbal gift by a Father to his eldest Son of his property, giving maintenance to the other: a Tirhoot case. On the death of the Father the question arose as to its validity. The Pundit observed, "The gift cannot be considered valid, because a Father and a Son possess an equal right in ancestral immovable property; consequently the younger Brother's right is established, and the estate becomes joint property, the gift of which is illegal." The following are the authorities cited by him:—The first authority is the text of Yajñwalcha, in the Vivada Retnacara, and others:—"The right of a Son and a Grandson in property acquired by a Grandfather, whether landed or other property, is equal." This has been explained by Jimuta Vahana, and has been already observed on. The second authority is quoted in the Vivada Retnacara:—"The shares of ancestral property, to which a Son and a Grandson will respectively *succeed*, are neither greater nor less than each other; the Son of the deceased has no option to *give it away*" The third authority is the text of Vrihaspati, cited in the Vivada Retnacara, and

other authorities, and is as follows :—" The right of a Son and Grandson in property, whether *movable* or *immovable*, acquired by a Grandfather, is equal ;" and in the Vivada Chundra it is thus written : " A Grandson's right in property acquired by the Grandfather is recognized even during the life of a Son." The other authority, denying the right to sell joint property, I will presently notice. The above text regarding the right of the Grandson bears out to the letter the accuracy of Jimuta Vahana's observations on the text of Yajñvalcha, par. 9, c. 2, p. 25. The Son and his Nephew were claiming the property, and had such been a case of competition between Brothers and Nephews, the Nephew would have had no title to the inheritance ; but this was a case of failure of one of the Brothers, and in such a case the son of the Brother will share the heritage in the order of their respective Fathers. (Mitacshera, c. 1, s. 4, pars. 7 and 8, p. 348.) The question in the instances given was a direct question of succession, and had nothing to do with an alleged community of interest which finds no support from authority. But I shall return to this subject in a subsequent part of my remarks.

It is quite true that repeated cases have determined that, according to the law of the Mitacshera, Sons have a right in the immovable estate of the Grandfather, but until lately no case has held that Sons could interfere with the Father's management of the estate. Speaking irrespective of decisions, it is curious to notice how such opinion of the rights of Sons has arisen.

Various texts lay down this principle, that joint property cannot be sold without the consent of the joint owners.

One can readily enough assent to the proposition that a man shall not sell the shares of others, but one cannot so readily admit that a man's own share of undivided property may not be disposed of by him. Independent of the text of Nareda, the good sense of the matter seems stated by Vachaspati Bhattacharya (1 Digest, p. 456), who observes :—" If the whole of the joint property be sold by one of the parceners, the sale is not valid, so far as regards the shares of the other

parceners, but is valid so far as regards the seller's own share ; and if it be sold with the consent of the co-parceners, the sale of the whole is valid."

This text regarding joint property, and the text of Yajñ-walcha, have been quoted by commentator after commentator, Pundit after Pundit, without the smallest examination, until the Courts, acting on such opinions, have taken for granted the truth of the doctrine so frequently reiterated.

The reproach levelled at the Indian Courts applies with greater force to the commentators and Pundits than to the Judges. Indeed, the correctness of the decisions of the Courts in India, with reference to Bengal, is fully supported by the various authorities I have given. It is quite clear that the text of Nareda (2 Digest, p. 101), has been overlooked alike by Mr. Colebrooke and Sir William Macnaghten ; for had it been present to the mind of the former, the uncertainty apparent in the various letters set out in Sir Thomas Strange's work, Vol. II., edition 1825, at pp. 419 to 428 inclusive, would no doubt have been in some respects corrected.

The proceedings in the Court of Madras will furnish not an irrelevant illustration on the subject I am now examining, of the rights of Father and Son. In the case of *Ramasawmy v. Sashachella*, Vol. II. p. 79 of Strange's *Notes of Cases at Madras*, Sir Thomas Strange, the Chief Justice of the Madras Court, wrote to Mr. Colebrooke for his opinion. In answer to such, at p. 79 of the above Cases, Mr. Colebrooke observed : "On the subject of the question which you had lately before you, I entirely agree with you, that a mortgage (sale or gift) by one of several joint owners, without the consent of the rest, is invalid for the other shares. In Bengal law, it is clear it is good for his own share, and for his only. In the other provinces, it is clear that the act is invalid, as it concerns other's shares ; and the only doubt which the subtlety of Hindoo reasoning might raise would be, whether it be maintainable even for his own share of undivided property. On the two first points, then, as stated by you, the law is, undoubtedly, as you

have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the alienees. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property entrusted to the part owner, who disposes of it, did suppose a power of disposal, or where he was the only ostensible and avowed owner; and generally when the acts, or even the silence, of the other sharers have given him a credit, and the alienee had no notice."

The decision in the above case was given in unison with the above opinion of Mr. Colebrooke, and continued to be the rule of the Madras Court for many years. The same principle was upheld in the case of *Varcasawmy Gramini v. Ayasawmy Graminy*, 1 Madras H. Court Reports, p. 471. I take the report from Mr. Norton's work, Vol. I. p. 216; there Sir Colley Scotland, the Chief Justice, said: "This was a suit for the recovery of two houses and premises numbered respectively 82 and 83 in the Chùlé Bazar Road, which the Plaintiff had purchased at a sale by the Sheriff of Madras, under a writ of fieri facias, issued to recover the amount of damages and costs in an action of trespass against the Defendant, Ayasawmy Graminy, and others. Three issues were settled; the first was, whether at the time of the sale the houses and premises were the sole and exclusive property of the Defendant, Ayasawmy Graminy, and the third whether at the time of the sale there was any valid and subsisting mortgage of the house No. 82. The Court disposed of these issues at the close of the case, finding the first in the negative, and the third in the affirmative, and both against the Plaintiff. But the second issue raised a further question, whether, assuming the houses and premises to be the property of the undivided family of which Ayasawmy and the Defendants, Ayasawmy Graminy and Dwane Ammul, are members, the Plaintiff, by virtue of such sale, ac-

quired any and what title and interest in the same; and upon this question we have now to give judgment. For the Defendants it was contended, as a matter of law, that the sale by the Sheriff passed no interest whatever in the family property, for that, even if it had been an alienation by Ayasawmy himself, without the consent of his co-parceners, such alienation would have been void and inoperative even to the extent of his own share, and this being a Sale upon execution in an action of damages for a tort, was put as an 'à fortiori' case. But we are of opinion that Ayasawmy might have made a valid alienation of his share and interest in the property, and that it passed under the sale in execution by the Sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment-debt, and the right of the execution creditor thereunder is the same as upon any other judgment for payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided joint families not possessing self-acquired property for any wrong, however great, which they may commit."

Mr. Mayne, however, mainly relied upon the general ground that no alienation by a member of an undivided Hindoo family, without the consent of his co-parceners, can bind even his own share, and he asked our consideration of several decisions of the late Sudder Court upon this subject.

It was not disputed that the course of decisions since, at least, the case of Ramasawmy v. Sashachella, and the opinion expressed by Mr. Colebrooke in his observations upon that case, supported the validity of such an alienation to the extent of the alienor's own share, nor that the same rule of law prevails in Bengal. But it was said there was a foundation for the rule in Bengal which does not exist according to the Hindoo law applicable to Madras; for that in Bengal the share of each parcener is treated as separate even before partition, though unascertained.

In support of this, the 31st section of the second chapter

of the Daya Bhaga was referred to. But that section appears to be a quotation from Nareda, and, according to Mr. Colebrooke's note to the passage, it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in c. 11, s. 1, par. 26, on the Widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text writers and commentators, makes the observation that "it is not true that in the instance of reunion (and of a subsisting co-parcenary) what belongs to one also appertains to the other co-parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a right to the whole." This observation is used only in reply to the argument that the preferable right of the surviving parcener may be deduced by inference from the fact that "the same goods which appertain to one Brother belong to another likewise;" and that "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But, according to both Schools of Hindoo Law, the right of survivorship is not absolute, and the undivided share, according to both, descends to his Sons; and it seems to us that the real ground upon which the Widow's right of succession is placed in the Daya Bhaga, is the authority of Vrihaspati, who says that "a Wife is declared by the wise to be half the body of her Husband, equally sharing the fruit of pure and impure acts; of him whose Wife is not deceased, half the body survives;" adding, "How, then, should another take his property while half his person is alive?" so that the right in truth rests upon the oneness of Husband and Wife, and not upon the existence of a separate estate and interest of the Husband in the property during his life. Such a separate estate as a matter of inference might be deduced as well from the descent of the Father's undivided share to Sons, which is common to both Schools of Law, as from its descent to his Widow, which is peculiar to the Bengal School.

It is further to be observed, that whatever distinction there exists in this respect was certainly present to the minds of Mr. Colebrooke and the other Judges who decided the cases above referred to. Then, after noticing some other cases, the Chief Justice, at Vol. I. p. 218 of Norton's work, observes: "We see nothing in these decisions that materially conflicts with (and some of them support) the opinion we have above expressed;" and Sir Thomas Strange, in the first volume of his work, at p. 202, expressly says, "that in favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition."

What the purchaser or execution-creditor is entitled to is the share to which, if a partition took place, the co-parcener himself would be individually entitled, the amount of such share of course depending on the state of the family. In this case there appear to be two Brothers and a Step-mother, and the share of each Brother is a moiety. There is no evidence of Ayasawmy's having Sons. If he had, they would no doubt be entitled to shares in their Father's moiety, and so the property available for the Plaintiff would, to the extent of their shares, be reduced; and, except in this way, the existence of Sons would not, we think, affect the Plaintiff's right. I may here make a remark in support of such judgment. I will suppose that the party dying left Sons. In such a case no point is clearer in Hindoo Law than that Sons are bound to pay their Father's debts, so far as assets extend, and the creditor could force them to do so. This principle seems to me to support the decision I have above quoted. It would have been a satisfaction to the Chief Justice of the Madras Court, to find that the text of Nareda, given at p. 101 of Vol. II. of the Digest, and the various texts which support the authority of a Father, are in unison with this judgment. It is most extraordinary that this text of Nareda has been so long overlooked, though plainly and clearly printed in the 2 Digest, p. 102, attention being

especially directed to it by Mr. Colebrooke placing the word undivided in italics, to attract attention. The importance of it is even overlooked by Sir William Macnaghten, though the text of Nareda is given at length in Macnaghten, Vol. II. p. 220. The principle on which it is attempted to defend some recent decisions which affirm the right of Sons to demand partition irrespective of the will of the Father, can rest only on the ground either of express decisions, or on equal rights of the Father and Son in ancestral real estate; but the texts I have given at length show, under the authority of nearly all the inspired legislators, that no such community of interest exists. The case above given, as Chief Justice Scotland observed, had been the law of Madras from 1813 to the time of delivering the judgment above given. I have now to notice a decision in the case of Sudabert Persaud Sahu v. Foobash Koer, 3 Bengal Law Reports, p. 31. This case was decided by the Calcutta High Court; it is given also at p. 219 of 1st Norton, to the following effect. The Chief Justice Sir B. Peacock observed: "The second question raises the point whether a member of a Hindoo family governed by the Mitacschera law, can mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. There are conflicting decisions on the subject, as pointed out by the Division Bench, by which the question was referred. The cases referred to from Dunbar's Bombay Reports, and that from the Reports of the High Court at Madras, are in support of the affirmative. The case of Cosserat v. Sudabert Persaud Sahoo, is an authority in support of the negative. The case has been very ably argued by the pleaders on both sides; and, in addition to the Mitacschera on Inheritance, translated by Mr. Colebrooke, numerous passages have been cited from the Sanscrit of other parts of the Dhurma Shastra of Yajnwalcha, together with several cases in addition to those referred to by the Division Bench. Amongst others, the pleaders have referred to the case of Viraswamy Graminy v. Ayaswami Graminy. In that case it was held that, according to the Hindoo law as it prevails in

Southern India, one member of a joint Hindoo family may sell his own undivided share of joint property, and that such share is liable to be seized and sold in execution for the separate debts of the sharer. The decisions founded on the doctrine of the Schools of Southern India and of Bombay, though entitled to great weight, are not sufficient to justify this Court, in a case governed by the Mitacshera law, in overruling a long series of decisions founded expressly on that law. In *Appovier v. Rama Subha Aiyar and others* (Moore's I. A., p. 75, Vol. XI.) it was held that an actual partition by metes and bounds was not necessary to render a division of undivided property complete; but that when the members of an undivided family agree among themselves with regard to a particular property that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property is taken away from the subject-matter so agreed to be dealt with; and each member thenceforth has in the estate a definite and certain share, which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided. In that case, however, their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think, be guided by the same principle.

Now the case referred to in support of the negative of the question, namely, *Cosserat v. Sudabert Persaud Sahoo*, was not the first case in which it was held that, according to the Mitacshera law, one member of a joint family cannot alienate his own share of joint ancestral property without the consent of all the other members. That decision was founded upon a current of authorities, supported by the Vyavasthas of Pundits, which it is too late now for the Court to overrule, even if it were disinclined to agree in the principle established by them. In *Nundram v. Kashee Pandee*, 3 S. D. A., p. 233, the question was put to the Hindoo Law officers of the Court, whether it was lawful, according to the law current in Tirhoot, for any one of several co-parceners to transfer his share either by

sale or gift; to which the Pundits replied, that a gift of joint undivided property, whether real or personal, was not valid even to the extent of the donor's share, and that property could not be sold or given away, until it was defined and ascertained, which cannot be done without a division; and they referred to the Mitacshera, by which it was said that "partition is the act of ascertaining several individual rights." The Court, acting on that opinion, affirmed the decision of the Lower Court. Afterwards, a review having been applied for, upon suspicion that the Pundit who had delivered the Vyavastha had been bribed, a fresh Vyavastha was called for from other Pundits of the Court, who answered, that property being held in joint tenancy by several sharers, whether it be real or personal, no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share, and give it away; and they cited as authorities first Vyasa in Mitacshera: "In immovable property, whether divided or undivided, all the sharers share alike; one person cannot sell, mortgage, or give it away." Nareda, in the Dattaka Mimansa: "Property held in common among many Sons cannot under any circumstances be alienated." Upon so considering the above Vyavastha, the Court ultimately upheld, upon review, the former decision. The Vyavastha given in the original case is quoted as an authority in Macnaghten's Hindoo Law, p. 224, case 17.

The principle in the above case was adopted in the case of Sheo Churn Misser v. Sheo Sahoy, decided in 1826, upwards of 40 years ago. In that case, the Judges of the Sudder Dewanny Adawlut recorded their opinion as follows: "The Hindoo law as laid down in Vyavasthas, delivered in former cases (referring to the cases above cited), does not permit alienation of lands held jointly by several putneedars or owners, to be made by one without the assent of the others; nor, indeed, does such alienation hold good even for the aliening partner's individual share, without the assent of the rest." In a note to the last case it is said: "The same doctrine was also maintained in a Tirhoot case, wherein Rajah Bidenund was Appellant, against

Jay Dutt Jha and other Respondents. The Pundits there also held the sale of joint undivided property to be invalid without the consent of all the sharers, and not valid even for the settler's own share, while undivided. A Vyavastha similar in effect, and a decision founded upon a similar principle, were given in 1832, in the case of Jivan Lall Sing v. Ram Govind Sing. The above principle was again acted upon in Sheo Churn Lall v. Jumun Lall, and in Mussumut Roopna v. Roy Reotee Rumun. A similar rule was followed and acted upon in the late Sudder Court of the North-Western Provinces in the case of Joynarain Sing and others v. Roshun Sing and others; and in the case of Byjnath Sing v. Ramessur Dyal and others, decided in 1864, the same Court held that in provinces where the succession among Hindoos is governed by the Benares Shastras, alienation of joint property, even to the extent of the aliener's own share, is invalid, but that if the property be partitioned the transfer is legal. In the Vivida Chintamani, by Prosono Cōomai Tagore, p. 77, it is laid down that "what belongs to many may be given with their assent." "Joint ancestral immovable property may be given with the assent of all the heirs." The assent of all the heirs is required for a gift of joint ancestral property, whether movable or immovable (p. 78). When the whole property is actually divided, the individual action of the shareholders is valid (p. 79). In the Mitacschera on Inheritance, it is said, c. 1, s. 1, p. 30: "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common." I was at one time disposed to think that, as one of several members of a joint family can compel partition of ancestral property against the will of others (see Mitacschera, c. 1, s. 5, p. 8), so he might, without the will of the others, alienate that share to which he would be entitled upon partition; but, upon reflection, I feel that opinion cannot be maintained according to the true principle of Mitacschera law. In the case of Approvier v. Rama Subha Aiyan, to which I have already referred, and which was a case governed by the Mitacschera, the Lords of the Judicial Committee say: "Ac-

cording to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of employment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has henceforth a definite and certain share, which he may claim a right to receive and enjoy in severalty, although the property itself has not been actually severed and divided." The Chief Justice further observed that, according to the law of England, if there be two joint tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition; but joint tenants under the English law are in a very different position from members of a joint Hindoo family under the Mitacsheera law; for instance, if a Hindoo family consist of a Father and three Sons, any one of the Sons has a right to compel a partition of the joint ancestral property; but upon partition during the life of the Father, his Wives are entitled to shares; and if partition is made after the death of the Father, his Widows are entitled to shares, and Daughters are entitled to participate. (See Mitacsheera, c. 7.) If partition be made during the life of the Father, and another Brother is afterwards born, that Brother alone will be entitled to succeed to the share allotted to the Father upon partition (Mitacsheera, c. 1, s. 6); but so long as the family remains joint, and separation has not been effected either by partition or by agreement, such as that recognized in

the case above cited from the Privy Council, every Son who is born becomes upon his birth entitled to an interest in the undivided ancestral property. In such a case, neither the Father nor any of the Sons can, at any particular moment, say what share he will be entitled to when partition takes place. The shares to which the members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, &c.; and the principle of the Mitacshera law seems to be, that no sharer before partition can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share.

If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for the purpose, to exclude from participation in the portion conveyed away those who by subsequent birth would become members of the joint family, and entitled to shares on partition. They "who are born, and they who are yet unborn, and they who are yet in the womb, require the means of support; no gift or sale should therefore be made." (Mitacshera, c. 1, s. 1, p. 27.)

The Court has very carefully referred to the passages quoted from the Sanscrit of the Dhurma Shastra of Yajñvalcha; and, in addition to the translation which was handed in, they have had a translation made by Baboo Shamachurn Circar, the chief sworn interpreter of the Court, as suggested at the time of the argument.

The Court sees nothing in these extracts at variance with the opinions above expressed. We are called upon to decide this case according to the Mitacshera law as we find it, and not according to our views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which for nearly half a century the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon. I am of opinion that upon the simple fact stated in the second

question, Bhewan Jall had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of his family.

As the text of Yajñwalcha and the prohibition against selling joint property have assisted in maintaining an alleged community of right in Father and Son, I may as well remark on some of the cases noticed by the Chief Justice in his judgment above given. The case of Nundram Pandee is reported, 3 S. D. A., p. 232, and the review is in 4 S. D. A., p. 70. It was a Tirhoot case. The marginal note states, according to the law current in Behar, neither joint property nor the profits arising from sacrificial fees are fit subjects of transfer. The question related to property dedicated to religious purposes and held by Bramins jointly. The answer of the Pundit, at p. 233, is, "that a gift of joint undivided property, whether real or personal, was not valid even to the extent of the donor's share, for property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division."

The authority given was the following: "Partition is the act of ascertaining several individual rights." (Mitacschera.)

This case was admitted to a review, and heard on June 30. (4 S. D. A., p. 70.)

On the 29th of July, 1824, the Judge, on suspicion of the integrity of the Pundit, put the same questions to other Pundits. The answer to the second question, at p. 76, was, "Property being held in joint tenancy by several sharers, whether it be real or personal, no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share and to give it away." The Mitacschera is quoted: "In immovable property, whether divided or undivided, all the sharers share alike among them; one person cannot sell, mortgage, or give it away." Nareda is also quoted: "Property in deposit, an only Son, a Wife; property held in common between many Sons cannot under any circumstances be alienated." In their answer to the fourth question, the Pundit says: "If Birt Maha Braminee be held in joint

tenancy by several sharers, unless it be divided, no one of the sharers is at liberty to alienate that portion thereof which forms his share, without permission of the other sharers;” and he gives the same passage from the Mitacshera, viz., “Vibhaya, or partition, is the act of ascertaining several individual rights.”

The text of Nareda lays down a principle that no one has ever doubted, that one man cannot sell the property of others. The doctrine laid down by this writer went no further, and the text of Nareda, so frequently alluded to by me, does not mean that a man may give away the rights of others, but only his own, and that he has a right to convey them even before partition. If the proposition laid down by the Pundits was intended as a general proposition, applicable alike to real and personal property, it fails as applicable to a Father, who, on the admission of all authorities, has entire dominion over the personal estate. It is singular that neither in the 3 S. D. A. nor in the 4 S. D. A., is there the smallest allusion to the text of Nareda, which is directly against the doctrine ultimately established. The quotation from the Mitacshera may be admitted without detriment. Rights are defined by partition, not created.

The case of Sheo Chund Misser v. Sheo Sohail, p. 158, 4 S. D. A., was a sale of joint landed property in Mizapore, by one partner, without the consent of the rest, set aside as being contrary to Hindoo law, and there being evident over-reaching on the part of the purchaser. In this case there was simply a reference to the opinions above given, without any additional authorities, with a notice of a Tirhoot case of Raja Bydanand Roy v. Jay Dutt Jha, where the Pundits held the sale of joint undivided property to be invalid without the consent of all the sharers, and not valid even for the seller's own share while undivided.

In Sheochurn Jall and another v. Jummun Jall and others (6 Select Reports, p. 176), the Court merely referred to the decision at p. 158, 4 S. D. A.

The case of Jewan Lall v. Ram Govind Sing (5 Select Reports, p. 163), A, B, and C were Brother's Sons and tenants in common of some ancestral lands. A, several years before death, by deed, gave his general estate to D, his Sister's Son, and

had his name recorded. On his death, B and C sued for A's interest in the undivided lands, and also for his personal estate and certain villages which they alleged as an accretion to the ancestral estate. Sudder Dewanny Adawlut affirmed judgment of lower Court passed on opinion of Pundit. This awarded right of B and C to A's share of the common villages, because undivided and therefore illegal. It dismissed rest of claim. By the Vyavastha, at p. 167, the gift is illegal as to ancestral properties. In this case no particular authority was cited.

I now approach a case which came before Mr. Stuart and Mr. Colebrooke, reported 2 S. D. A., p. 74: Sham Sing v. Ormaottee. This case I have already alluded to, and request the reader's particular attention to it. The marginal note is, "By the Hindoo law as current in Mitilha (Tirhoot), a Father cannot give away the whole ancestral property to one Son to the exclusion of the other Sons."

The Pundits of the Zillah and Provincial Courts differed in opinion with regard to the law in this case, the former pronouncing such gift as invalid, and the latter valid.

The Pundits of the Sudder were required to answer—1st, Whether the gift pleaded by Defendant was valid. 2nd, Whether such gift would be complete without seizin being given during the life of the donor.

Opinion was as follows:—1st. If a Hindoo possessing immovable ancestral property, some time previous to his death express himself to this effect in talking of his eldest Son: "He will become sole proprietor on my death, and my younger Son will be provided by him with a suitable maintenance;" the gift cannot take place from the omission of the word *dan* (donation) in the expression, which, both according to the Shasters and the current practice of the country, is essential to complete the gift. Further, supposing the word *dan* (donation) to have been expressed in the above sentence, still the gift cannot be considered valid, because a Father and Son possess an equal right in ancestral immovable property; consequently, the younger Brother's right is established, and a verbal gift under any circumstances of immovable property, unless supported by

a Hibbanamah, is invalid. The authorities agreeable to which this Vyavastha has been delivered are the Vivada Retnacara, Smriti Samoochya, Vivada Chundra, Vivada Chintamani, and other works current in Mitilha. The first authority is the text of Yajñwalcha, recorded in the Vivada Retnacara, Smriti Samoochya, and other treatises: "The right of a Son and a Grandson in property acquired by a Grandfather, whether landed or other, is equal."

The second authority is quoted in the Vivada Retnacara, and is as follows: "The shares of ancestral property to which a Son and a Grandson will respectively *succeed*, are neither greater nor less than each other; the Son of the deceased has no option to give it away." The third authority is the text of Vrishpati, cited in the Vivada Retnacara, Smriti Samoochya, Vivada Chundra, and other authorities, and is as follows: "The right of a Son and a Grandson in property, whether movable or immovable, acquired by the Grandfather, is equal;" and in the Vivada Chundra it is thus written: "A Grandson's right in property acquired by the Grandfather is recognized even during the life of a Son." The fifth and sixth authorities cited by the Pundits referred to gifts of joint property, to which I need not further allude. I have remarked above on the generality of the allegation that Sons are entitled to equal rights in property, whether movable or immovable, acquired by a Grandfather, which has been re-asserted on the review. The generality of such a proposition is not true, and is contradicted by Menu and Yajñwalcha. The main purpose for which I allude to the authorities cited by the Pundits is to show that the remarks by Jimuta Vahana on the passage from Yajñwalcha, cited in the Mitacshera, are accurate in every respect. Yajñwalcha was speaking of the descent of property, not establishing community of right.

This is clear from the passage quoted from the Vivada Retnacara: "The shares of ancestral property to which a Son and Grandson will respectively *succeed* are neither greater nor less than each other; the Son of the deceased has no option to give it away." The latter words of this quotation render it

certain that there was a question which of the two succeeded to the estate. In addition to the above, the text of Vrishpati, cited in other works: "The right of a Son and a Grandson in property, whether movable or immovable, acquired by a Grandfather, is equal." Now the proposition contained in this authority is true in all respects if applied to a case of descent, irrespective of the acts of the Father, but is not, as I have observed, true if affirmed as showing community of interest. The quotation also from the Vivada Chundra: "A Grandson's right in property acquired by a Grandfather is recognized *even during the life of a Son.*" This shows beyond the possibility of doubt that the question was not community of interest with the Father, but who was entitled on the Father's decease. The text of Yajñvalcha referred to the descent of property, and had nothing to do with community of interest. I trust the reader may excuse the above repetitions, as the point is very important as establishing the accuracy of the opinion of the author of the Daya Bhaga. One has also the authority of an eminent barrister for reiterating arguments. Though on a late occasion the worthy and able Counsel was not quite so ready in answering the expostulation of the Chief Justice of the King's Bench as a party was, in other days, who, when addressing the Court, being asked by one of the Judges: "Why do you repeat it so often?" "My Lords," replied the astonished and indignant Counsel, "my Lords, there are three of you."

I cannot but notice an error which not only pervades this judgment, but which has found its way into other decisions. I allude to supposing that the Mitacshera is a paramount authority, irrespective of the law as laid down by what are deemed the inspired legislators—Menu and others. In observing on a case decided by the Privy Council, on which I shall make a few remarks, the late learned Professor of Sanscrit, Mr. Goldstucker, in a pamphlet, p. 17, published by Trübner & Co., 60, Paternoster Row, "On the Deficiencies in the Present Administration of Hindoo Law," stated: "I must here observe (speaking of the Sevagunga case) that this judgment is exclu-

sively based on what their Lordships consider to be the law of the Mitacschera. That the Mitacschera is one of the law authorities in the South of India is unquestionable, but it is likewise an undisputed fact that it is not the primary authority in that part of India. As before stated, the Mitacschera, which is merely a running commentary on the text of Yajñwalkya, is incomplete in many respects."

It cannot be pretended for a moment that the author of that work, in commenting on the text of Menu and others, has a title to destroy the texts themselves. No such authority could be claimed by him or any commentator. It is singular that in this case before the High Court of Calcutta above given, no notice has been taken of the text of Nareda, 2 Dig. 101, which authorizes a joint owner of undivided property to sell. The Chief Justice refers to Sir W. Macnaghten's work, Vol. II. p. 224, as supporting the Vyavastha given by the Pundits; but had he turned two leaves back, at p. 220, he would have seen the text of Nareda contradicting the principle contended for.

No case can be put higher than the case of a Father and Sons; and the uncontrolled power of the Father, even according to the author of the Viramitrodaya, has *but one limitation* in the case of partition among them. His uncontrolled power, so far as disproving an alleged community of interest in Sons, is positively supported by the plain and unequivocal texts I have given.

It is not unusual for commentators to destroy the very text they are commenting upon; but the attempt to enlist Menu as authorizing Sons to claim partition, irrespective of the will of the Father, in direct opposition to the text of Menu itself, has, at least, one merit, that of novelty, to recommend it.

The mistakes I have already pointed out speak little for the accuracy of the writers, when we find them affirming propositions which are distinctly repudiated by all the inspired writers. Jimuta Valhana, speaking of the power of Sons to make partition, irrespective of the will of the Father, remarks, c. 1, par. 42: "The alleged power of Sons to make partition when the Father is incapable of business, has been asserted through ignorance of

express passages of law to the contrary." This is a strong charge made by this able and erudite writer, Jimuta Vahana, but is a true one. I now proceed to quote a case which will illustrate my remarks on commentators.

Confining my remarks at present to the rights of a Father, the decision to which I allude is the case of Rya Ram Tewany and others v. Luchman Pershud (8 Sutherland, H. C. Reports, p. 16), decided in the High Court of Calcutta. The marginal note is: "According to the Mitacshera law, a Son acquires by birth a right to ancestral property, and has a right, during his Father's lifetime, to compel a partition of such property. The Father cannot, without the consent of the Son, alienate such property except for sufficient cause, and the Son may not only prohibit the Father from so doing, but may sue to set aside the alienation, if made. The cause of action to the Son accrues when possession is taken by the purchaser. A new cause of action does not accrue upon the subsequent birth of a younger Brother, either to the elder Brother alone or to him and his Brother jointly." The Chief Justice, Sir B. Peacock, in delivering judgment, refers to pars. 7, 8, 9, and 10 of the Mitacshera, c. 1, s. 5, which I have already alluded to. The extraordinary part of this judgment is this, that after observing on the above paragraphs, the Chief Justice remarks: "Par. 11, c. 1, s. 5, p. 279, was cited to show that the Father was not bound to divide ancestral estate; but it does not establish that point. In that paragraph the commentator refers to Menu as an authority that the Father, however reluctant, must divide the Grandfather's estate; and he points out a distinction as regards ancestral wealth recovered by the Father, which is put on the same footing as self-acquired property; and he holds that Menu, by the declaration, shows that the Father was bound to divide other ancestral property." That there may be no mistake on this subject, I may repeat the text of Menu above given.

Menu, c. 9, s. 104.

"After the death of the Father and the Mother, the Brothers, being assembled, may divide among themselves the paternal

and maternal estate ; but they have no power over it while their parents live, unless the Father chooses to divide it."

There is another decision which is given at p. 292 of Vol. I. Norton's Cases. It was the case of Nagalinga Moodelly v. Subramanya Moodelly (Madras High Court Reports, p. 77), where the able and respective Chief Justice has been apparently led into error by relying on a passage in Mr. Strange's manual of Hindoo law. In that case it was held that a Son and Grandson could compel a division of ancestral family property. There Chief Justice Scotland observed : "The plaintiff may, I think, maintain the suit. I have had some difficulty in seeing how c. 1, s. 2, par. 7 of the Mitacshera is to be reconciled with the placita in the 5th section of the said chapter. But, upon consideration, I think that they are not necessarily inconsistent, and that Sons may compel a division of ancestral family property at the hands of the Father. I must, however, be distinctly understood as deciding this case with reference to ancestral property only. The Advocate-General refers to Sir Thos. Strange's work on Hindoo law, and no one can read the passages cited without coming to the conclusion that the opinion of that author was that, except in the instances he gives, namely, of civil death, by entering into a religious order, and of degradation, working a forfeiture of civil rights, Sons could not compel a division." Sir Thomas Strange (Vol. I. p. 179) says : "Whatever might be the case among the Hebrews, no Hindoo can, according to the law as it prevails in the Bengal provinces, under any circumstances say to his Father, in the peremptory language of the Prodigal, 'Father, give me the portion of the goods that falleth to me.' The Father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper ; but with the exception of two cases, partition among the Hindoos in the lifetime of the Father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his Son's ; and in support of this he cites Menu, c. 9, s. 104, and the Mitacshera, c. 1, s. 2. Turning to the latter, we find, at par. 7, "One period of partition is when the Father desires

separation ; as expressed in the text, 'When the Father makes partition.' Another period is while the Father lives, but is indifferent to wealth and disinclined to pleasure, and the Mother is incapable of bearing more Sons ; at which time a partition is admissible at the option of Sons against the Father's wish." Sir Thomas Strange proceeds (Vol. I. pp. 279, 280) : " A text, indeed, of Menu is referred to, as showing that if ancestral property belong to the Father, the Sons may, at their pleasure, exact a division of him, however reluctant ; and it is true (as has been already intimated) that their claim upon property descended is stronger than upon what has been otherwise acquired ; but the inference drawn in the Mitacshera is at variance with the current of authorities, including Menu himself, whose obvious meaning in the text referred to is simply that ancestral property recovered without the use of the patrimony classes, upon partition, with property acquired ;" and passing on to consider the law applicable to this Presidency, the same learned author says (Vol. I. p. 184) : " In the Provinces dependent on the Government of Madras, and elsewhere in the Peninsula, the right of the Son to exact partition of ancestral property, independent of the will of the Father, appears authorized, but not without the existence of circumstances to warrant the measure ; such as the Father having become superannuated and the Mother past child-bearing, the Sisters also married ; and there are two occasions, upon either of which, wherever the Hindoo law prevails, dominion may be transferred from the Father in his life, without his consent, whether the property claimed by the Sons to be divided be ancestral or acquired. These are, voluntary devotion, by which the Father is considered as having renounced it, and degradation from caste, by which it is forfeited." I do not find in Sir Thomas Strange's work anything to get rid of this qualification as to the right of Sons to a division in their Father's lifetime ; and my mind was at one time in considerable doubt on the subject. But in Mr. Justice Strange's Manual of Hindoo Law, the learned author states the law in the broadest possible manner. He says, in s. 245 : " Sons may at their will, and

irrespective of all circumstances, compel their Father to divide with them the ancestral property ;” and for that he cites the Mitacshera, c. 1, s. 5, par. 8. Turning to that passage, we find he is abundantly confirmed. It is in these words : “ Thus, while the Mother is capable of bearing more Sons, and the Father retains his worldly affections, and does not desire partition, a distribution of the Grandfather’s estate does necessarily take place by the will of the Son.” Certainly nothing can be more explicit ; and at par. 11, Vignaneswara says : “ Menu likewise shows that the Father, however reluctant, must divide with his Sons at their pleasure the effects acquired by the paternal Grandfather ;” and then he refers to the text in Menu, c. 9, s. 209, to which Sir Thomas Strange alludes, when he says that the inference drawn in the Mitacshera is at variance with the current of authorities. I think we must consider the Mitacshera, c. 1, s. 2, par. 7, as applicable to the law governing the division of property generally, and s. 5, pars. 8 and 11, as applying to ancestral property. The Mitacshera, therefore, confirms the view taken by Mr. Justice Strange in his manual, and in this Presidency the Mitacshera is the governing authority. I think, therefore, that as to ancestral property, a Son, and, therefore, a Grandson, may compel a division against the will of his Father or Grandfather.

It is a great pity that this worthy and respected Judge omitted to refer to Menu itself. Not only was Sir Thomas Strange opposed to the finding in this case, but Colebrooke, Ellis, and Sutherland were unanimous in opinion that a Son could not force a partition against the will of the Father. They all must have considered this par. 8, at p. 279, unwarranted, or they could not have given the above opinion.

They were consulted by Sir Thomas Strange on cases occurring at Madras, and their opinions are given in extenso above. In addition to this, the opinions of the Judges of the North-West Provinces, and Mr. John Colvin, a Judge of the Sudder Dewanny Adawlut in Bengal, were unanimous in holding that Sons could not, during the life of the Father, interfere with his enjoyment of the property. Mr. Justice

Strange was the Son of Sir Thomas Strange, and ought to have noticed the united opinions of these able men, Colebrooke, Ellis, and Sutherland; owing, I suppose, to the illness of Mr. Norton, the Advocate-General at Madras, a mistake has crept into his work at p. 294 of Vol. I. The opinions I have above alluded to are put down as sanctioning the general right of Sons to enforce partition, instead of contradicting it. The proposition that Sons have generally a right during the life of their Father at any time to demand partition, is pregnant with consequences the most mischievous, and is directly opposed to the numerous authorities I have alluded to. The singularity of the matter is this: Mr. Justice Strange copies, verbatim, par. 8 from the *Mitaeshera*; the *Mitaeshera* maintains such to be the opinion of Menu; and it turns out, on reference, that such statement is directly opposed, not merely to Menu, but to all the other inspired legislators I have alluded to. Sir William Macnaghten, though he alludes to par. 7 of the *Mitaeshera*, p. 258, regarding the four periods of partition, never notices par. 8, p. 279, c. 1, s. 5. He must have been aware that such paragraph was wholly unwarranted by authority.

Mr. Colebrooke, also, in giving the opinion conjointly with Messrs. Sutherland and Ellis, that Sons could not, against the will of the Father (except under special circumstances), call for partition, must have been aware that par. 8, p. 279, of the *Mitaeshera*, was not only unwarranted by authority, but absolutely contradicted by Menu himself.

Having examined the power of the Father, as maintained by Jimuta Vahana, with reference to Sons, I now pass on to examine how far the opinion of that able writer, Jimuta Vahana, is accurate regarding the rights of the Widow. It seems nearly universally admitted that the Mother succeeds before her Daughter, 3 Digest, 494. On this point I need not trouble the reader. Jimuta Vahana maintains that, on a Father dying without male descendants, the Widow succeeds to his entire estate, ancestral or self-acquired. The following are the authorities on this point:—

Menu, c. 9, s. 45.—The learned Bramins announced this

maxim: "The Husband is even one person with his Wife for all domestic and religious purposes, not for all civil purposes."

Menu, c. 9, s. 96.—To be mothers were women created; to be fathers, men; therefore religious rites are ordained in the Veda to be performed by the Husband together with the Wife.

Menu, c. 9, s. 187.—"To the nearest Sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on the failure of Sapindas and their issue, the Samanodaca or distant kinsman shall be heir, or the spiritual preceptor, or the pupil, or the fellow-student of the deceased." That the Wife is a Sapinda, as being connected in body with her Husband, is shown by the extract from Parasara Madhava, p. 3 of preface, and pps. 15 and 16 of the Appendix to a translation of the Mitacshera, published in 1869, by Rajendro Missry and Opproakash Chunder Mookerju.

Menu, c. 9, s. 185.—Not Brothers nor parents, but Sons, if living, and their male issue, are heirs to the deceased, but of him who leaves no Son, nor a Wife, nor a Daughter, the Father shall take the inheritance, and if he leaves neither Father nor Mother, the Brothers.

Menu, c. 9, s. 212.—But if he leave neither Son, nor Wife, nor Daughter, nor Father, nor Mother, his uterine Brothers and Sisters, and such Brothers as were reunited after a separation, shall assemble and divide his share equally.

Menu, c. 9, s. 217.—Of a Son dying childless, and leaving no Widow, the Father and Mother shall take the estate, and the Father and Mother also being dead, the paternal Grandfather and Grandmother shall take the heritage, on failure of Brothers and Nephews.

Yajnwalcha, quoted 3 Digest, 457.—A Wife, Daughters, both Parents, Brothers, their Sons, kinsmen sprung from the same original stock, distant kindred, a pupil, and a fellow-student in theology.

On failure of the first of these, the next in order shares the estate of him who has gone to heaven, leaving no male issue. This law extends to all classes.

Vrishpati, 3 Digest, 458.—1. "In Scripture, in law, in sacred ordinances, in popular usage, a Wife is declared by the wise to be half the body of her Husband, equally sharing the fruit of pure and impure acts.

2. Of him whose Wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?

3. Although distant kindred, although the Father and Mother, although uterine Brothers be living, the Wife of him who dies having no male issue shall succeed to his share.

4. Since she was previously espoused in due form she must support the consecrated fire, and after the death of her Husband, the Widow faithful to her lord shall take his wealth. This is a primeval law.

5. Taking his effects movable and immovable, the precious and base metals, the grain, liquids, and clothes, let her cause the several shraddas to be offered in each month, on the sixth, and at the close of the year.

6. With food consecrated to the gods and the manes, let her honour parental Uncles, spiritual Parents, Daughters' Sons, the offspring of her Husband's Sisters and his maternal Uncles, learned men, unprotected persons, guests, and females of the family.

Vrishpati, 3 Digest, 476.—1. If Brothers who have made a partition become through mutual affection reunited, and again make a division of their joint property, the first-born has no right to a larger portion.

2. Should any one of them die, or anyhow seclude himself from the world, his share shall not be lost, but devolve on his uterine Brother.

3. But she who is his Sister is next entitled to take the share. This law concerns him *who leaves no issue, nor Wife, nor Father, nor Mother.*

Datta, 3 Digest, p. 488.—Wealth is common to the married pair; after the death of her lord, the Mother shall have an equal share with her Sons.

Vishnu, 3 Digest, p. 489. — The wealth of him who

leaves no male issue goes to his Wife; on failure of her, to his Daughter; if she be dead, to the Son of a Daughter; if there be no such Grandson, to the Father; in his default, to the Mother; on failure of her, to the Brother; if he be dead, to the Brother's Sons; in default of these, to the remoter kindred; on failure of kindred, to one descended from the original stock; if there be none such, to the fellow-student; on failure of him, to the King, excepting the property of a Bramin.

Vrihaspati, 3 Digest, 502. — The Mother must be considered as the heiress of her Son who dies leaving neither Wife nor male issue; or, with her consent, the Brother may be heir.

Catayana, 3 Digest, 576. — The childless Widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it.

The following text is given in the 3rd Digest, p. 478, Vriddha Menu:—"A Widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties of Widowhood, shall alone offer the cake at his obsequies and succeed to his whole share."

The Mitacshera, also, at c. 2, s. 1, par. 6, p. 325, observes, Vriddha Menu also declares the Widow's right to the whole estate: "The Widow of a childless man, keeping unsullied her Husband's bed and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share."

The text is also cited in the Daya Bhaga, c. 11, s. 1, par. 7, p. 161. Thus Vriddha Menu says: "The Widow of a childless man, keeping unsullied her Husband's bed and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share."

The text appears, also, from 3 Digest, p. 479, to have been cited by Chandeshwara, and it is also cited in the Chintimani, p. 289. Vriddha Menu says: "A Widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly per-

forms the duties of Widowhood, shall alone offer the cake at his obsequies and succeed to his whole estate."

The texts above given from Sir W. Jones's translation, c. 9, ss. 185, 212, and 217, even independent of s. 45, c. 9, amply show the opinion of Menu as to the right of the Widow. A text of Catayana is given in the Mayhooka, p. 101, to the following effect :—" After the death of the Husband, the Widow, preserving (the honour) of the family, shall obtain the share of her Husband so long as she lives ; but she has not property (therein to the extent of) gift, mortgage, or sale."

It is not unimportant, when considering how the denial of the right of the Widow to succeed to the entire estate of her Husband is warranted by authority, to find that the author of the Mitacshera himself admits that Menu is against him. To this I may add, that not merely Menu, but the very text he is commenting on, is directly opposed to him.

In considering the order of descent of property, one should not forget that the Mother in all cases of succession precedes the Daughter. This stands admitted by all authorities, from Menu to the present time. Jimuta Vahana, in maintaining the right of the Widow to succeed to the whole estate, at c. 11, s. 1, pars. 43 and 44, observes, " But on failure of heirs down to the Son's Grandson, the Wife, being inferior in pretensions to Sons and the rest, because she performs acts spiritually beneficial to her Husband from her Widowhood (and not like them, from the moment of their birth), succeeds to the estate on their default." Thus Vyasa says : " After the death of her Husband, let a virtuous woman observe strictly the duty of continence, and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her Husband. Let her day by day perform by devotion the worship of the gods, and especially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys

her Husband, though abiding in another world, and herself (to a region of bliss)."

"44. Since by these and other passages it is declared that the Wife rescues her Husband from hell, and since a woman doing improper acts through indigence causes her Husband to fall (to a region of horror), for they share the fruits of virtue and of vice, therefore *the wealth devolving on her is for the benefit of the former owner*, and the Wife's succession is consequently proper."

The author of the Mitacshera places the Wife and Daughter in succession after the Brother, but this is clearly wrong, and the Mitacshera, at c. 2, s. 2, par. 2, when observing on the right of Daughters and Daughters' Sons, furnishes his own refutation. At p. 341 of Colebrooke's translation Catayana says, "Let the Widow succeed to her Husband's wealth, provided she be chaste, and in default of her, let the Daughter inherit, if unmarried;" and Vrishpati remarks, "The Wife is pronounced successor to the wealth of her Husband, and in her default the Daughter. As a Son, so does a Daughter of a man proceed from his several limbs. How, then, should any other person take her Father's wealth?" At par. 6 of the same chapter, Vishnu says, "If a man have neither Son or Son's Son, nor (wife nor female) issue, the Daughter's Son shall take his wealth; for, in regard to the obsequies of ancestors, Daughters' Sons are considered as Sons' Sons." Menu likewise declares, "By that male child whom a Daughter, whether formally appointed or not, shall produce from a Husband of an equal class, the maternal Grandfather becomes the Grandsire of a Son's Son. Let that Son give the funeral oblation and possess the inheritance." Yet the Mitacshera would postpone such a Grandson to the Brother, in opposing the Widow's claim to succeed to the entire estate, whether divided or undivided. The author of the Mitacshera is driven to contend that her right only exists when a separation has taken place. The texts given contain no such limitation. The legislators are speaking generally of the descent of the entire estate to Sons and others in succession; they are providing in what names the wealth and

inheritance of the owner is to go ; they are speaking of joint property, and all property in Hindoo law is considered joint unless proved to be otherwise. Jimuta Vahana puts this matter with great accuracy, at p. 160, c. 11, s. 1, p. 4-5, where, after giving the following texts of Yajñvalcha and Vishnu, he says, in this manner Yajñvalcha says: " The Wife and the Daughter, also both parents, Brothers likewise, and their Sons, Gentiles, cognates, a pupil and fellow-student ; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all persons and classes." Thus affirming (as Jimuta Vahana observes) the right of the last-mentioned ; on failure of the preceding, the Sage propounds the succession of the Widow in preference to all other heirs.

5. So Vishnu ordains " the wealth " of him who leaves no male issue goes to his Wife ; on failure of her, it devolves on Daughters ; if there be none, it belongs to the Father ; if he be dead, it appertains to the Mother ; on failure of her, it goes to the Brothers ; after them, it descends to the Brothers' Sons ; if none exist, it passes to the kinsmen (*bandhu*) ; on their default, it devolves on relations (*saculya*) ; failing them, it belongs to the pupil ; on failure of these, it comes to the fellow-student ; and for want of all those heirs, the property escheats to the King. " By this text " (Jimuta observes) " relating to the order of succession, the right of the Widow to succeed in the first instance is declared. It must not be alleged that the mention of the Widow is intended merely for the assertion of her right to wealth sufficient for her subsistence ; for it would be irrational to assume different meanings of the same term used only once, by interpreting the term ' wealth ' as signifying the whole estate in respect of Brothers and the rest, and not the whole of the estate in respect of the Wife ; therefore the Widow's right must be affirmed to the whole estate."

Par. 7. Thus Vriddha Menu says : " The Widow of a childless man, keeping unsullied her Husband's bed and persevering in religious observances, shall present his funeral oblations, and obtain (his) entire share." Jimuta Vahana, when maintaining

the Widow's right to the whole estate instead of mere subsistence, at par. 8 observes : " His " is repeated or understood from the words " his funeral oblation," for that term alludes to her Husband. The meaning, therefore, is, " the Wife shall obtain her Husband's entire share," not " she shall obtain her own entire share ;" for the direction that " she shall obtain " would be impertinent in respect of her own complete share ; since the intention of the text is to declare a right of property, it ought not to be interpreted as declaring such right in regard to the person's own share, for that is known already from the enunciation of it as that person's share (and it need not, therefore, be declared). The passage from Nareda regarding giving maintenance to women, is alluded to by Jimuta Vahana at p. 177, c. 11, s. 1, pars. 48 and 49, and by the Mitacshera, c. 2, s. 1, par. 7, p. 326, and also at p. 332, pars. 20, 21. Both these writers contest its application to Wives ; and the only difference between the Daya Bhaga and the Mitacshera consists in the former maintaining the Widow's right to the entire estate, in unison with Menu, Yajnwalcha, Vishnu, and others, whereas the Mitacshera restricts her right to the estate held by a party when separated. It may not be irrelevant to see in what manner the right of the Widow has been opposed by other writers. In the Chintimani, at p. 291, we find the following passage, part of which has been already given : " When the Husband dies without partition with his co-heirs, he has no share at all." What, then, could his Wife receive ? It cannot be argued that she is entitled to a share like her Husband, because there is no authority for this ; nor should it be argued that the preceding texts (Menu, Vishnu, and Vrishpati) are authority for her receiving a share, because they merely allude to the separate property of a Husband. In answer to the same or a similar argument, Jimuta Vahana, at p. 166, c. 11, s. 1, par. 25, observes : " But it is said this inference is derived from reasoning. Thus in the instance of reunion (or in that of a subsisting co-parcenary), the same goods which appertain to one Brother belong to another likewise. In such case, when the right of one ceases by his demise, those

goods belong exclusively to the survivor, since his ownership is not divested. They do not belong to the Widow, for her right ceases on the demise of her Husband in like manner, as his property devolves not on her, if Sons (or other male descendants) be left.

26. That argument is futile ; it is not true that in the instance of reunion (and of a subsisting coparcenary), what belongs to one appertains also to the other parcener, but the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole, for there is no proof to establish their ownership of the whole, as has been before shown (when defining the term partition of heritage). Nor is there any proof of the position that the Wife's right in her Husband's property accruing to her from her marriage ceases on his demise. But the cessation of the Widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue. Nothing can be abler than the refutation given to such statement by Jimuta Vahana. The descent of the property to Sons where Brothers are joint, as noticed by Chief Justice Scotland, is actually destructive to the assumed entire ownership of each of the Brothers. Moreover, the text of Nareda, 2 Digest, 101, to which I have so often alluded, is distinctly opposed to the doctrine affirmed by the Chintamani and others ; nor does the decision of the Privy Council in the case of *Approvier v. Rama Subha Aiyan* and others, alluded to above, in any way interfere upon the principle affirmed and supported by the clear and accurate reasoning of Jimuta Vahana. In what way does the right of the Widow cease, as affirmed by the Chintamani? Let me put the highest case. Suppose a Father having a Wife and three Sons, equally partitions his estate, the Widow, on the admission of both Jimuta Vahana and the Mitaeshera, is entitled to a share. Suppose, again, that the Father dies, leaving his Widow and such Sons. If the Sons should partition the estate, the Widow is clearly entitled to her share. In what way will her rights cease? The duties of Widowhood commence on the demise of her Husband. Even

Devala, who, at one place, places the Brothers before the Widow, comes round to the opinion of Vishnu and Yajñvalcha (*see* pp. 296 and 297 of the Chintimani); and the inaccuracy of Devala's text is shown by Jimuta Vahana at p. 164, c. 11, s. 1, par. 17, in placing the Widow last in succession, and the Daughter before both the Mother and the Brothers. Jimuta Vahana also points out the error in placing the Brother before the Widow in the order of succession, by showing, at pars. 28 and 29, c. 11, s. 1, p. 167, that the Father even could come in before the Brothers.

The texts which I have given as supporting the Widow's right to the undivided estate are even acknowledged by the author of the Retnacara, who, at p. 297 of the Chintimani, is represented as stating: "Therefore it is concluded in the Retnacara, that the order of succession mentioned by Yajñvalcha and Vishnu obtains in property acquired by Forefathers, and in other property the order of Paithinasi and others obtains." Now the following is the text of Paithinasi: "The effects of him who leaves no male issue go to his Brother; on failure of Brothers, his Father and Mother shall take the heritage" (Chintimani, p. 296). In attempting to reconcile this text, which shuts out the Widow, the Daughter, and the Daughter's Son, the author of the Chintimani, at p. 297, may well admit that the contradiction in the passage of Paithinasi cannot be removed. In attempting to reconcile the passage from Paithinasi, the author of the Retnacara is directly opposed to what is contended for by the Mitacshera. Jimuta Vahana, after alluding to the opinion of Paithinasi and others, at p. 163, c. 11, s. 1, par. 15, finally comes to the conclusion, at p. 175, c. 11, s. 1, par. 46, that "The assumption of any reference to the condition of the Brethren as separated, or as reunited, not specified in the text, is inadmissible (being burdensome and unnecessary). Therefore the doctrine of Jiten-drya, who affirms the right of the Wife to inherit the whole property of her Husband leaving no male issue, without attention to the circumstance of his being separated from his co-heirs or united with them (for no such distinction is speci-

fied), should be respected. The principle of Hindoo law regarding succession to property is admirably illustrated by Mr. Justice Dwarkanaut Mitter. The case is reported at p. 557, Vol. II., of Norton's Cases. The commentary by Mr. Justice Dwarkanaut Mitter on c. 11 of the *Daya Bhaga*, which refers to the right of the Daughter and Daughter's Son, well deserves perusal. It bears out in the strongest manner the accuracy of the observations of Jimuta Vahana on the rights of the Widow and Daughter.

That the view taken by the author of the *Daya Bhaga* was in accordance with the opinion of Sir William Jones seems clear, from the following copy of a paper in Sir William Jones's handwriting, given at p. 259 of 2 Strange's *Hindoo Law*, edition of 1825:—"In all classes, if a man die without issue male, the following is the canon of inheritance, and, on failure of the first-named, the next in order inherits. The Wife, the Daughters, the Parents, the Brothers, the Son of a Brother, the kinsman within the seventh degree, the more distant kinsman, the pupil, the fellow-student."

Vishnu.—"The estate of a man who leaves no male issue goes to his Wife; if he leaves no Wife, it goes to his Daughter; if he leaves no Daughter, it goes to the Grandsons, to his Father, and then to his Mother."

2nd. Yajñvalcha:—"Of a perpetual student in theology, of an anchorite, and of a hermit (who are all civilly deceased), the heirs are in order: the virtuous pupil and the brother in study, or he who has had the same preceptor." Menu.—"If the Husband has been a co-heir, and died before partition, his Brother and the next in order inherit his undivided share, but his Wife takes all his divided property." (On this paragraph I shall presently observe.) Jimuta Vahana.—"Whether his estate was divided or undivided, fixed or movable, his Widow inherits." So Raghunandana, Sri-Christna and others very properly make no distinction where the legislators make none. Yajñvalcha.—"Widows are declared to have a mere usufructuary inheritance in the estate of their deceased lords, and they must by no means alien or waste it, except for the necessities of life. They

may, however, give part of it to a virtuous priest, through affection for their lords, in order to perform religious rites for his soul." Vrihaspati.—"In the Veda, in the written codes of law, and by the immemorial usage of men, the Wife is declared by the wise to be half of her Husband's body, sharing equally with him the fruit of good or bad conduct. As long as the Wife lives, half his body is alive, though the other moiety may have perished; and while half of his body subsists, who else can inherit the wealth, even though his kinsmen exist—his Father, Mother, and Brother, by both parents? yet if he die without male issue, by males in the third degree, his Widow shall inherit his estate." Sir William Jones, after quoting Mr. Halhed's Compilation, c. 2, s. 12, read his own translations of the original text from which the first words of that section of Mr. Halhed's book are taken. Sir William Jones's version of them runs thus:—"After the civil or religious death of the Father, although the Sons have an absolute right to his property, yet, while the Mother lives, it is illegal for them to divide that property.—Sir William observed that the word which he has rendered illegal is, * which seems to be equivalent to *inofficious* in Latin, and to import something more than not right or decent, which is Mr. Halhed's phrase. It means inconsistent with civil and religious duty. Sir William Jones then read his own translation of an extract from the sacred text of Menu (so he writes the name). It is in these words:—"After the death of both the Father and Mother, the Brothers meet and equally divide the paternal inheritance; while the parents live, they are not masters of it." Gloss.—"From this text it appears that the Brothers of the whole blood must divide the estate after the death of both parents; that they cannot at their own pleasure divide while the Mother is living; but that a legal division may be made with her assent if they are desirous of living together undivided: the eldest Brother (being of ability to transact business and keep house) shall take the whole, and the other Brothers shall live under him as under their Father. So in the text of Menu, the eldest Brother shall take entire possession

* A blank is left in original.

of the paternal estate, the others shall live under him as under the Father." It is manifest from the above paper that Sir William Jones deemed the construction of the texts of the legislators given by Jimuta Vahana to be the true and just construction of the same.

In the paper alluded to, in the hand-writing of Sir William Jones, there is a passage which I have above given, and which is stated to be the text of Menu; but this is a mistake, for no such passage can be found in Menu. The doctrine stated in such paragraph is maintained by the Mitacschera, not Menu, as such alleged text has been cited in the Sevangunga case, reported in Moore, I. A., vol. 9, p. 539. I may remark that Mr. Goldstucker, the late Professor of Sanscrit in the London College, in observing on the decision of the above case, was in error in supposing, at p. 18 of his pamphlet, that where a family is admitted to be joint, that no question could judicially occur in an undivided family so long as it remained undivided. In a note to the above page, he observes: "The question, therefore, what is ancestral and what is self-acquired, can judicially only occur at the time when division takes place. This is an entire mistake, for separate property can be held by parties in an undivided family." This is clear even from the Mitacschera, c. 1, s. 4, pars. 1 and 2, 4, 5, and 6, p. 268, and also at p. 271, par. 10. All property, in consideration of Hindoo law, is considered joint, but this does not prevent a party from showing his separate acquisition. This was held in the Dhurn Doss Pandee v. Mussumut Shama Soondeace, 3 Moore, P. C. Indian Appeals, p. 240. Moreover, the cases are numerous where parties, though generally joint, have supported their claims to separate property. (*See Subuns Lall v. Hurbuns Loll and Rooder Ram*, 1 S. D. A., p. 91; *Pertab Sing v. Talook Daree*, 1 S. D. A., p. 178; *Than Sing v. Mussumut Jetoo*, 2 S. D. A., 320 (Pundit's opinion); *Koolnath Sing v. Jagcass Sing*, p. 15; 5 Select Reports, and 7 S. D. A., Select Reports, p. 67. The remarks of the late learned Professor are deserving of more attention regarding the non-existence of an alleged right of survivorship among Brothers.

That able Judge, Lord Justice Turner, in giving judgment in the Sevangunga case, 9 Moore, I. A., p. 610, observes :—" There are two principles in which the rule of succession, according to the Hindoo law, appears to depend. The first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased ; the other is *an assumed right* of survivorship. Most of the authorities rest the uncontested right of Widows to inherit the estates of their Husbands, dying separated from their kindred, on the first of these principles (1 Strange's Hindoo Law, p. 135) ; p. 142 of edition of 1825 ; but some ancient authorities also invoke the other principle (Vrishpati, 3 Digest, p. 458)." Also Sir W. Jones's paper, cited in 2 Strange's Hindoo Law, p. 250 (p. 259 edition of 1825), says : " Of him whose Wife would be deceased, half the body survives ; how should another take the property while half the body of the owner lives ? " Some slight error has crept into the Report of the Lord Justice's judgment in the reference to the 3 Digest, 458. This does not apply to the principle of survivorship. The Lord Justice goes on to observe : " Now, if the first of these principles were the only one involved, it would not be easy to see why the Widow's right of inheritance should not extend to her Husband's share in the undivided property, for it is on this principle that she is preferred to his divided Brothers in the succession to a separate estate. But it is perfectly intelligible that, upon the principle of survivorship, the right of the co-parceners in one undivided estate should override the Widow's right of succession, whether based upon the spiritual doctrine or on the doctrine of survivorship. It is, therefore, upon the principle of survivorship that the qualification of the Widow's right, established by the Mitacshera, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons of it. According to the principles of Hindoo law, there is co-parcenaryship between the different members of a united family, and survivorship following upon

it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had a common interest and a common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails, and there are no grounds for postponing the Widow's right to any superior right of the co-parceners in the undivided property." The passage from Nareda, given at p. 551 of 9 Moore's Indian Appeals, which the Pundits quoted, is as follows:—That among undivided Brothers, if one die without male offspring, or enter a religious order, the rest of the Brethren shall divide his wealth, except the Wife's separate property, is not consistent with the text of the same legislator which I have above referred to, which expressly gives a power to one co-parcener to sell his own share of undivided property. But the text is grounded on a mistake in placing the Brother before the Widow, in the order of succession to property. This is not merely shown by the authorities cited, but is conclusively made out by Nareda's admitting that the Daughter precedes the Brother. The principle on which Nareda maintains the right of the Brothers to succeed to the entire inheritance, does not rest on any right founded on survivorship, but is placed on the ground "that they are next in succession according to the rule of inheritance." At 9 Moore, I. A., p. 615, an error appears to have crept into the judgment of Lord Justice Turner, in alluding to the passage cited from Menu, in Sir William Jones's paper, at p. 250 of 2 Strange, second edition (and p. 259 of edition of 1825). I will repeat the passage of Menu: "If the Husband has been a co-heir, and died before partition, his Brother and the next in order inherit his undivided share, but his Wife takes all his divided property." This text, even if it were a true one, would not show that the Brother takes the share by virtue of survivorship, but simply that he takes the

inheritance by the law as applicable to succession. The fact is, that there is no such text to be found in Menu. The only text in Menu which could be supposed as authorizing such a remark is s. 146, c. 9: "He who keeps the fixed and movable estate of his deceased Brother, maintains the Widow, and raises up a Son to that Brother, must give to that Son, at the age of fifteen, the whole of his Brother's divided property." This refers to the case of a Widow being duly appointed to raise up issue. The course of conduct on this is shown by Menu at s. 62, c. 9. The first object of the appointment being obtained, according to law, both the Brother and the Widow must live together, like a Father and Daughter, by affinity. Such a proceeding, according to Menu, is denounced at ss. 66, 67, and 68; c. 9. "Since his time (the time when Vena had sovereign power), the virtuous disapprove of that man who, through delusion of mind, directs a Widow to receive the caresses of another for the sake of progeny;" and such is no longer law, except in the instance specified in ss. 69 and 70; all such texts are previous to the passages regulating the descent of property on the demise of the owner, being ss. 186, 187, 212, and 217, c. 9, which distinctly and unequivocally declare the Widow's right.

The observation of Sir William Jones, where Jimuta Vahana is cited, shows that he deemed the construction of Jimuta Vahana, as to the right of the Widow to the entire estate, to be the true construction.

Sir Thomas Strange, in Vol. I. p. 141, edition of 1825, observes: "Such union of interests among families living together and carrying on their transactions in common, constitutes co-parcenary, to which survivorship attaches, differing in this particular respect from co-parcenary with us, and resembling rather joint tenancy, so that on the death of a Widow parcener, the succession to his rights, with exception of property separately acquired by him, vests in the other remaining members—his Sons, if he leave any, representing him as to his undivided rights, while the females of his family continue to depend on the aggregate fund, and

under the general protection, till a partition takes place, which may never happen. But, according to the law of Bengal, where an undivided co-parcener dies leaving a childless Widow, his share does not vest in the surviving parceners, but descends to his Widow as his heir, whereas the Mitacschera restricts her right of inheriting to the case of her Husband so dying separated, allowing her, where he dies undivided, a maintenance only. In every other case, universally, survivorship takes place, the remaining co-parceners continuing to administer and enjoy the undivided property the same as if no death had happened among them. No authority, so far as I know, can be produced in support of such assumed right of survivorship, irrespective of the right of succeeding to such property when next in the order of succession; and the passage from Sir Thomas Strange *on due attention* contains its own refutation, for he shows that the property descends to the Sons of the respective sharers on their death, being direct destruction to the principle of survivorship that he assumes. Such, moreover, would be refuted by the opinion of Mr. Colebrooke, given at p. 77 of 1 Strange on an Indian case, in which it was held that the consent of the sharers, express or implied, was indispensable to a valid alienation of joint property beyond the share of the actual alienor;” and such was a true opinion, and supported by the text of Nareda, 2 Dig. 101. By a perusal of the several letters of Mr. Colebrooke to Sir Thomas Strange of date the 18th May, 1812; 20th May, 1812; and 22nd July, 1812, given from pp. 419 to 426, it will be apparent that he had forgotten the opinion given by him in the Madras case. Even in the letter to Sir Thomas Strange, at p. 427, when alluding to the Smriti Chandrica, a writer in Southern India, regarding the power of a joint owner to give away his proper share yet unseparated of the common property, he seems still to have overlooked the important and decisive text of Nareda, 2 Dig. 101, which would have materially qualified his remarks in the various letters above alluded to.

This only furnishes an example that what is in a man's mind is not always present to his recollection. It is not diffi-

cult to see how the error in question has arisen, Nareda having declared (2 Digest, p. 97) what is lent for use, a pledge, joint property, a deposit, and the whole estate of a man who has issue living, the Sage has declared inalienable even by a man oppressed with grievous calamities, and of course what has been promised to another. This text has been taken as establishing a general proposition preventing a co-parcener from selling or pledging his own share, and such will appear from the Chintimani, pp. 72 and 73; Moyhookha, p. 165; and Mitacshera, p. 257, c. 1, s. 1, par. 30, without the smallest allusion to the text of Nareda (2 Dig. p. 101), which distinctly authorizes the act. If there had been any text authorizing a right of survivorship among Brothers when one dies leaving no Son or Son's Son, such would surely have been declared by the author of the Mitacshera, instead of resting on some texts distinctly at variance with all the texts of the leading authorities which declare the rights of the Widow. The Wife takes the inheritance as the nearest sapinda on the Father dying without male issue, by the direct text of Menu, c. 9, s. 187. With reference to an alleged survivorship among Brothers, such is absolutely refuted by the text of Menu, c. 9, s. 217, which shows that on one of the Brothers dying without Wife and childless, the Father and Mother will take before the Brothers, which could not be if there were any such act of survivorship. It is not a little singular that, in affirming the right of the Brothers before the Widow, the author of the Mitacshera is in direct opposition to the text of Yajñvalcha, on which he is commenting, and, by his own admission, to Menu and others. I trust it will not be considered that when I am defending the accuracy of the principles laid down by Jimuta Vahana in the Daya Bhaga, that I am denying the various decisions which have been passed by the Courts following the doctrines propounded by the Mitacshera. The Sevagunga case was in unison with them, though it is clear that the late worthy and respected Judge who delivered the judgment of the Privy Council was pressed by the difficulty which existed, under authority, in excluding the Widow. If the observations in the

Mitacshera with reference to the right of the Widow be more than questionable, his placing the Daughter and Daughter's Son after the Brothers, is absolutely indefensible. The following are the authorities which support their right to succeed to the estate :—

Daughter and Daughter's Son.

MENU, c. 9, s. 130, 3 Digest, 166.—The Son of a man is even as himself, and as the Son such is the Daughter; how, then, can any one inherit his property but a Daughter, who is closely allied to his own soul?

MENU, c. 9, s. 132.—The Son, however, of a Daughter who succeeds to all the wealth of her Father dying without a Son, must offer two funeral cakes, one to his own Father, and one to the Father of his Mother.

MENU, c. 9, s. 133.—Between a Son's Son and the Son of a Daughter there is no difference in law; since their Father and Mother both sprang from the body of the same man.

PARASARA, 3 Dig. 490.—The unmarried Daughter shall take the inheritance of the deceased who left no male issue, and on failure of her the married Daughter.

NAREDA, 3 Dig. 491.—If there be no Son, the Daughter is *heiress* by parity of reason, for she keeps up the progeny, *since* a Son and a Daughter both continue the race of their Father.

DEVALA, 3 Dig. 491, 492.—To unmarried Daughters a nuptial portion must be given out of the estate of their Father, and his own Daughter lawfully begotten shall take, like a Son, the estate of him who leaves no male issue.

NAREDA, Dig. 474.—Among Brethren, if any one die naturally, or civilly, and have no issue, the rest may divide his property among themselves, excepting the wealth of his Wives, and shall support them till they die, provided they preserve unsullied the bed of their Husband; but from other Widows the heirs may resume their exclusive property.

Independent of the objections made both by the Mitacshera and Jimuta Vahana respecting the clauses where women and Wives are alluded to, this statement is open to the objection

that he is placing the Daughter before the Mother (*see* 3 Dig. 494).

Nareda, also, 3 Dig. 540, observes, on failure of Daughters, the heirs are kinsmen allied by family, more distant kindred, and men who claim the same origin with the deceased. On failure of all these, the property escheats to the King.

2. Excepting the wealth of a Bramin, a King attentive to his duty shall allot a maintenance to the Wives of the deceased. This is declared to be the rule of inheritance.

The Daughter's right is also maintained by Yajñvalcha (3 Dig. 457).

A Wife, Daughters, both Parents, Brothers, their Sons, kinsmen sprung from the same original stock, distant kindred, a pupil, and fellow-student in theology.

On failure of the first of these, the next in order shares the estate of him who has gone to heaven, leaving no male issue. This law extends to all classes. (It is impossible to maintain that such does not apply to co-parceners, for all property is considered *primâ facie* as joint.)

VRISHPATI, 3 Dig. 481.—As she (the Daughter) becomes owner of her Father's estate, although kinsmen be living, so likewise her Son is acknowledged to be the heir of the estate left by his Mother and maternal Grandfather.

VISHNU, 3 Dig. 489.—The wealth of him who leaves no male issue goes to his Wife; on failure of her, to his Daughter; if she be dead, to the Son of the Daughter; if there be no such Grandson, to the Father; in his default, to the Mother; on failure of her, to the Brother; or, if he be dead, to the Brother's Sons; in default of them, to the remoter kinsmen; on failure of kindred, to one descended from the original stock; if there be none such, to the fellow-student; on failure of him, to the King, except the property of a Bramin.

VISHNU, 3 Dig. p. 498.—On failure of Sons and of their male issue, the Sons of Daughters shall obtain the property; for the male offspring of a Son and of a Daughter are equally qualified to perform obsequies for men of all classes. In a note to this text Jaganatha observes: "Chandeswara also suggests

the title of a Daughter's Son in preference to Brothers, by citing the text of Vrishpati with these words premised: 'immediately after a Daughter and the Son of a Daughter.'"

Then the text of Vrishpati, at p. 499, 3 Dig. is given:—"On failure of them (in default of Daughter and Daughter's Son), uterine Brothers, kinsmen bearing the same family name, pupils and learned priests, are entitled to possess the estate."

Menu, c. 9, s. 185, Dig., Vol. III. p. 186.—"Not Brothers nor Parents, but Sons, if living, or their male issue, are heirs to the deceased; but of him who leaves no Son, nor a Wife, *nor a Daughter*, the Father shall take the inheritance; and if he leave neither Father nor Mother, *the Brothers*."

Then comes another text of Vrishpati, p. 186, Dig., Vol. III.—"As Sons, so do Daughters of men spring from successive bodies; how, then, should any other human being inherit the property while a Daughter exists?"

"Married to a man of equal class, virtuous, delighting in submission, *she shall inherit her Father's estate, whether she is expressly appointed or not, to raise up male issue to him*. As she becomes owner of her Father's wealth, even though kinsmen exist, so does her Son claim the estate of his Mother and maternal Grandfather."

Par. 6 of Mitacshera, p. 342, c. 2, s. 3.—Vishnu says: "If a man leave neither Sons nor Son's Son, nor (Wife nor female) issue, the Daughter's Son shall take his wealth; for, in respect to the obsequies of ancestors, Daughter's Sons are considered as Son's Son."

Menu likewise declares: "By that male child whom a Daughter, whether formally appointed or not, shall produce from a Husband of an equal class, the maternal Grandfather becomes the Grandson of a Son's Son, let that Son give the funeral oblation and possess *the inheritance*."

When we turn to c. 2 of the Mitacshera, regarding the rights of Daughter and Daughter's Son, at p. 341 of Colebrooke's translation, one is literally astonished that no attempt is made to justify their postponement. On the con-

trary, the texts of Catayana and Vrishpati, at par. 2, are directly against such postponement. The following are the texts:—

Catayana.—“Let the Widow succeed to her Husband’s wealth, provided she be chaste; and in default of her, let the Daughter inherit, if unmarried.” Vrishpati also observes: “The Wife is pronounced successor to the wealth of her Husband, and, in her default, the Daughter. *As a Son, so does the Daughter of a man proceed from his several limbs; how, then, should any other person take her Father’s wealth?*” Moreover, at par. 6, p. 342, the author of the Mitacshera observes: “By the import of the word ‘also’ (pars. 1 and 2), the Daughter’s Son succeeds to the estate on failure of Daughters.” Thus Vishnu says: “If a man leave neither Son nor Son’s Son, nor (Wife nor female) issue, the Daughter’s Son shall take his wealth; for, in regard to the obsequies of ancestors, Daughter’s Sons are considered Son’s Sons. Menu likewise declares: “By that male child whom a Daughter, whether formally appointed or not, shall produce from a Husband of equal class, the maternal Grandfather becomes Grandsire of a Son’s Son; *let that Son give the funeral oblation and possess the inheritance.*”

On the subject to which I have before alluded—the assumed right of survivorship among parties—the judgment of Mr. Justice Dwarkanauth Mitter, in the 5th Bengal Reports, p. 15, is of the last importance. It was a question of inheritance, whether, under the Bengal School, the Son of a paternal Uncle’s Daughter was entitled to succeed to the estate of a deceased Hindoo, if no nearer heirs are forthcoming. The following is a portion of the judgment delivered by him:—“The solution of this question depends upon the true construction of the *Daya Bhaga*, a treatise on the Hindoo law of inheritance by Jimuta Vahana, the acknowledged founder and chief of the Bengal School. The other authorities current in that School, such as the *Daya Crama Sangraha* of Sreekrishna Tarkalankar, the *Dyatatwa* of Raganundana, and the *Digest* of Jaganatha, are all of them almost exclusively founded on the *Daya*

Bhaga, and such difference of opinion as there is between them, and the fundamental treatise is entirely confined to a few cases of detail, which involve no conflict of principle of any kind whatever. Such, then, being the state of the authorities, it is necessary first of all to ascertain whether the Daya Bhaga itself is founded on any general doctrine or principle which will enable us to arrive at a satisfactory conclusion on the point now under our consideration. We are of opinion that there is such a principle, and that it is no other than spiritual benefit. That the Hindoo law of inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient Rishis or Hindoo Sages, whose texts are regarded as the fundamental source of that law, and all the commentators on it, whose opinions are recognized as authorities in the different Schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as their exclusive, guide. The author of the Daya Bhaga is no exception to the rule; on the contrary, he is clearly and expressly of opinion, as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle alone that questions relating to it must be determined. It is to be borne in mind that the Mitacshera, or rather the Benares School of Hindoo law, was the dominant School in Bengal when the Daya Bhaga was written, and that some of the lawyers of that School were of opinion that the word *sapindas*, as used by Menu, indicated mere consanguinity, and not the power of conferring spiritual benefit. The author of the Daya Bhaga, as the founder of a new School, expressly repudiates this doctrine, by declaring that the nearest of kin indicated by name is absolutely dependent on the presentation of offerings. 'Nor should it be pretended,' he says (Colebrooke's Daya Bhaga, p. 18, s. 6, c. 11, page 219), 'that the text of Menu (to the nearest sapindas, male or female, the inheritance belongs) is intended to indicate nearness of him

according to the order of birth, and not according to the presentation of offerings, for the order of birth is not suggested by the text. But Menu declaring that oblations of food as well as libations of water are to be offered to three persons, and that the fourth in descent is the giver of oblation, but neither is the fifth descent a giver of them, thus declares nearness of kin, and shows that it depends on superiority of (benefits by) presentation of oblations.' We shall have occasion hereafter to comment at length upon the text of Menu referred to in this verse, but what we wish to be particularly borne in mind for the present is, that, according to that test, as interpreted by the author of the *Baya Dhaga*, the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the soul of the deceased proprietor. 'It is by wealth,' he says, in verse 13 of the same section, 'that a person becomes the giver of oblations.' 'Two motives,' he continues in the same verse, 'are indeed declared for the acquisition of wealth, one temporal enjoyment, the other the spiritual benefit of alms, and so forth. Now, since the acquirer is dead, and cannot have temporal enjoyment, it is right that his wealth should be applied to his spiritual benefit.' Then, again, in verse 29 of the same section, he says: 'Inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit;' and the same principle is laid down still more clearly and emphatically in the preceding verse, which says, 'Therefore, such order of succession must be followed as will render the wealth of the deceased most serviceable to them.' In order to remove all reasonable doubt on a point of so much importance, we think it necessary to make a few observations on the mode in which the principle of spiritual benefit has been actually worked out in the *Daya Bhaga*. The work purports, on the face of it, to be a treatise on the partition of heritage, but it is really divisible into two distinct branches, one relating to the subject of partition among co-heirs, the other to the order of succession to be followed when different persons are claiming the same estate by right of in-

heritance. The first of these two branches has no material bearing on the point involved in the present discussion, and we will, therefore, confine our remarks entirely to the second. Now it is beyond all dispute, that the whole of this portion of the *Daya Bhaga* is nothing but an elaboration of the doctrine of spiritual benefit. Every point for which a discussion is thought necessary is ultimately determined by that doctrine; and it is by that doctrine that every difficulty is ultimately removed. The text of *Menu* and various other Hindoo Sages are frequently cited, it is true, as the highest authorities on Hindoo law; but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted, and it is by that light that every discrepancy existing between them is reconciled. If examples are necessary, we have only to go through c. 11 of the *Daya Bhaga*, which contains the whole law of inheritance relating to the estate of one who has left neither Sons, nor Grandsons, nor Great-grandsons. It will be seen, that the first and most prominent characteristic of the order of succession laid down in this chapter is the studious exclusion of female relatives generally. It is to be borne in mind that these relatives are as a class disqualified by their sex to perform the religious ceremonies prescribed by the Hindoo *Shastras* for the promotion of the spiritual welfare of a deceased individual; and hence it is that the author of the *Daya Bhaga* has generally excluded them from the category of heirs. The few that are allowed to come in are allowed to do so on the authority of special texts; but, even in their case, the doctrine of spiritual benefit is expressly put forward as the ultimate reason for the selection. Thus, for instance, the Widow is no more competent than other relatives of her sex to perform the ceremony of the *Parvana Shraud*, to which we shall have to refer more specifically hereafter; but she is, nevertheless, according to the author of the *Daya Bhaga*, 'half the body of her deceased husband;' and the consequences of all her acts, whether virtuous or vicious, must be necessarily borne by his soul. It is for this reason that she is recognized as heir, and

it is by the light of that reason that the numerous conflicting texts bearing on her case are reconciled one with another. • ‘Since by these and other passages,’ he says (Colebrooke’s *Daya Bhaga*, p. 44, s. 1, c. 11, p. 174), ‘it is declared that the Wife rescues her Husband from hell, and since a woman doing improper acts through indigence causes her Husband to fall into a region of horror, for they share alike the fruits of virtue and vice, *therefore the wealth devolving upon her is for the benefit of the former owner, and the Wife’s succession is consequently proper.*’ The discussion on the question of precedence between the Widow on the one side, and the Son, the Grandson, and the Great-grandson on the other, is significant. If the Widow be really half the body of her Husband, how is it that Sons, Grandsons, and Great-grandsons are allowed to supersede her?

“The author of the *Daya Bhaga* answers this objection by stating that the power of the Widow to confer spiritual benefit commences from the date of her Husband’s death, whereas Sons, Grandsons, and Great-grandsons confer such benefit from the moment of their birth (*see* p. 43, s. 1, c. 11, p. 173).

“The next exception made is in the case of the Daughter, and she is allowed to come in because she can confer great spiritual benefit on her Father by giving birth to a Son, who will deliver him and his ancestors from hell, and hence it is that those Daughters who are barren or childless Widows are carefully excluded from the line of inheritance. The maiden Daughter is allowed to come in first because her marriage might be delayed on account of indigence beyond the age of puberty, and the salvation of her Husband’s soul and those of his ancestors might be thereby jeopardized; so that even here the spiritual welfare of the deceased proprietor is distinctly recognized as the ultimate ground of the decision. The same remarks are also applicable to the Mother, the Grand-mother, &c., for it will be seen that in each of these cases some peculiar spiritual benefit or other is invariably put forward as the basis of the discussion.”

It is unnecessary for me to give the remainder of Mr. Justice Dwarkanauth Mitter's masterly judgment. The text of Menu, c. 9, s. 187, is important: "to the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs." Now the Wife is a sapinda, as may be seen from the extract from the Parasara Madhawa (*see* p. 3 of the Preface and pp. 15 and 16 of the Appendix to a translation of the Mitacshera, published in 1869, by Rajendro Missry and Opproakash Chunder Mookarjee). If any such alleged principle of survivorship existed, such could hardly have escaped the attention of the Mitacshera or Jimuta Vahana, when examining the rights of the Widow. Jimuta Vahana maintains that the Widow stands next in the order of inheritance to a person leaving no Sons or male descendants, whereas the author of the Mitacshera places the Brothers, when the family is undivided, in the order of succession before the Widow and Daughter. The remarks of Chief Justice Scotland in the case above given are literally decisive against any assumed survivorship, because he points out that it is not an inherent right in the Brothers; and both the Mitacshera and Daya Bhaga agree that Sons would inherit, while Menu and other authorities only postpone the right of the Widow to the inheritance in default of male issue.

If any such principle of survivorship existed, it could hardly have escaped the attention either of Jimuta Vahana or of the Mitacshera in examining the rights of the Widow and daughter. It is very singular that the various texts and authorities supporting the principles laid down by Jimuta Vahana, and essentially assailing the truth and accuracy of the texts and doctrines and quotations of the Mitacshera, should not previously have attracted attention. If they had been attended to, Mr. Justice Strange might have qualified his observations on Jimuta Vahana, and assuredly he would have some reason to doubt the correctness of the following encomium:—"The Mitacshera, or Vignaneswareyum, is the great authority in the School of Benares, and by consequence in that of Madras, and the work is so associated with that of Menu, the chief founder

of the law, that the two are commonly received together—Menu-Vignaneswareyum, as the embodiment of all law.

I am now defending the opinion of Jimuta Vahana, and the correctness of the decisions of the Bengal Courts in supporting the claims of the Widow and Daughter before that of the Brother. In what way are we to decide when authorities differ? Are there no rules laid down by Hindoo authorities which may determine such a question?

At p. 6 of Preface to Saumchurn's work, octavo edition, he observes:—"The law of Menu was so much revered, even by the Sages, that no part of their Codes was respected if it contradicted Menu. The Sage Vrishpati, now supposed to preside over the planet Jupiter, says in his law tract that 'Menu held the first rank among legislators because he had expressed in his Code the whole sense of the Veda; that no Code was approved which contradicted Menu; that other Shastras and treatises on grammar or logic retained splendour so long as Menu, who taught the way to just wealth, to virtue, and to final happiness, was not seen in comparison with them. Vyasa, too, the son of Parasara, has decided that the Veda, with its Angas, or the six compositions deduced from it; the Revealed System of Medicine; the Puranas, or Sacred Histories; and the Code of Menu, were four works of supreme authority, which ought never to be shaken by arguments merely human. Above all, he is highly honoured by name in the Veda itself, where it is declared that what Menu pronounced was a medicine for the soul.'" In addition to this, I think it will be found that in very many of the Vyavasthas of the Pundits given to the Courts in India, he is placed at the head of all authorities cited by them: and even Jaganatha, in his Digest, Vol. I. p. 454, declares that Menu was the highest authority of Memorial Law. Even independent of considerations arising from the opinion of Menu himself, the authorities seem absolutely decisive against the inference drawn by the author of the Mitacshera. The error that has crept into the text of Nareda, giving precedence to the Brother, is absolutely clear from the text which he gives showing that the Daughter

comes before the Brother ; and this is decisive, as showing the error in question, for all agree that the Mother precedes the Daughter.

Vrishpati, 3 Dig. 541, pronounces that to be of no authority which contradicts the sense of Menu's ordinances, and it is consistent with just reasoning to infer, that as that exposition of a law which is most conformable with reason prevails, when two interpretations of it are found in competition, so the exposition of the law of Menu which coincides with the text of another ancient Sage shall prevail when two interpretations are proposed.

If such be, according to Hindoo law, a correct method of weighing authorities, the opinion of the Mitacshera is actually unwarranted. The Courts may find themselves bound by the decisions which have passed excluding the Widow and Daughter in countries where the Mitacshera prevails. The decisions, however, given in Bengal which support the opinion of Jimuta Vahana regarding the rights of the Widow and Daughter, I have endeavoured to show are not wanting in authority to support them.

In the preceding observations I have endeavoured to show that the Courts of Bengal have not erred in supporting, with reference to Bengal, the doctrine laid down by the able and erudite author of the *Daya Bhaga*. I have attempted to show that if the question between the *Daya Bhaga* and the Mitacshera were to rest on reasoning founded on authority, the doctrine inculcated by Jimuta Vahana would be the preferable one. Decided cases, however, have supported the opinions expressed by the author of the Mitacshera, so far as showing a vested right in Sons in ancestral real estate ; but late authorities, on which I have commented, have gone the length of maintaining that Sons, according to the Mitacshera, may take the estate out of the hands of the Father and claim partition irrespective of his Will. I venture, with all respect, to say that such interference with parental authority was neither contemplated nor authorized by Hindoo law. I doubt very much whether the incongruities which appear from the decisions will ever be

settled without legislative authority. There is, no doubt, great difficulty in interfering with decisions long established. I make this last observation with reference to those decisions which regard the sale of joint property in cases where the Mitacschera prevails.

I have ventured to glance at some matters regarding partition which appear to me at variance with the due authority of a Father, and inconsistent with unequivocal texts. And I have no doubt that such will be carefully considered by authority. That the advice of Sir William Jones, recommending the translation of the leading Sanscrit works, did not meet attention, is much to be lamented.

The Digest by Jaganatha was selected by Sir William Jones, and the translation was completed by Mr. Colebrooke.

This work was translated in 1795, and Menu a year or so previous. Nearly the whole of the texts which I have cited, as showing the accuracy of Jimuta Vahana's treatise, have been taken either from the Digest of Jaganatha or the Institutes of Menu. It is singular that no English translation of the Virimetrodaya, which ranks high at Benares, has appeared. From the extracts I have above given, the author appears to have been a man of intelligence and ability. It would have been advantageous also to have had translated the work of Culluca Bhatta, who resided at Benares, and of whose work Sir William Jones thus speaks:—"It is the shortest, yet the most luminous; the least ostentatious, yet the most learned; the deepest, yet the most agreeable Commentary ever composed on any author, ancient or modern." As the useful work of Sir William Macnaghten is, no doubt, in the hands of all students of Hindoo law, it will not, I trust, be deemed disrespectful for me to notice one or two errors into which Sir William has fallen. At p. 23 of his first volume he observes: "According to the law of Bengal and Benares, the Daughter's Sons inherit, in default of the qualified Daughters; but the right of Daughter's Sons is not recognized by the Mitilha School." This is an error which is pointed out in a decision reported at p. 142 of the sixth volume of Select Reports. The marginal note is: "The

author of the Vivada Chintamani, a Mitilha work, has omitted the Daughter's Son from a series of heirs; but, according to other authorities, including Mitilha legal writers, the right of a Daughter's Son next to a Daughter is declared. The Sudder Dewanny Adawlut adjudge that the Daughter's Son is heir, disregarding his omission in the said work, and thus ruling that the position in the Daya Crama Sangraha (p. 10, s. 3), that the Daughter's Son, according to Mitilha writers, is not an heir, is erroneous."

This position seems to have been adopted by Sir William Macnaghten, in his Hindoo Law, without sufficient investigation. There is also another error at pp. 23 and 24 of the first volume, where Sir William remarks: "If one of several Daughters, who had as maidens succeeded to their Father's property, die, leaving Sons and Sisters or Sisters' Sons, then, according to the law of Bengal, the Sons alone take the share to which their Mother was entitled, to the exclusion of the Sisters and Sisters' Sons;" and he quotes a case decided in 3 S. D. A., p. 26, the marginal note of which is as follows:—"According to the Hindoo law, property inherited by a Daughter goes at her death to her Son or Grandson, to the exclusion of her Sister or Sister's Son." I need only at present observe that the marginal note is not warranted by the case itself. This case, together with a loose expression in the Daya Crama Sangraha, appears to have led the High Court into error, in a case reported in Sutherland's Reports, Vol. VI. p. 147. The marginal note is: "According to the Hindoo law current in Bengal, in default of Son, Grandson, Great-grandson, or Widow, the unmarried Daughter succeeds in preference to the married Daughters; and if the unmarried Daughter should subsequently marry and die, leaving male issue, her Son will succeed, to the exclusion of the married Sisters and their male issue;" and for this Sir. W. Macnaghten, Vol. I. p. 25, is cited, and, singular enough, the Daya Bhaga, at p. 193. This judgment seems to have somewhat disturbed the equanimity of the worthy Chief Interpreter of the High Court, Saumchurn, who, at pp. 167, 1,062, and 1,063, octavo edition, examines the matter. The loose expression in the Daya Crama Sangraha, which has con-

tributed to this clearly erroneous judgment of the High Court, will be found at p. 7 of Wynch's translation, on the right of a Daughter. At par. 3 it is observed: "The following special rule must be here observed, namely, that if a maiden Daughter, in whom the succession had once vested, and who was subsequently married, should die *without having borne issue*, the married Sister who has, and the Sister who is likely to have, male issue, inherit together." Saumchurn shows how this loose expression, which I have put in italics, came to find its way into the Daya Bhaga, being no part of the Daya Bhaga itself. "Though such is a loose expression of Sree Kristna, it must not be supposed for a moment that that writer supports any such proposition as that assumed in the case in 6 Sutherland's Weekly Reports, p. 147. It will be seen, by reference to s. 4, p. 9, ss. 1 and 2 of the Daya Crama Sangraha, that the right of the Daughter's Son is in default of all Daughters (who are entitled to succeed). The text of the Daya Bhaga on the subject is plain and unequivocal. At p. 193, c. 11, s. 2, p. 29, the author observes, "Therefore the succession of the Daughter's Son, on failure of Daughters, as affirmed by Viswarupa, Jitendrya, Bhojadeva, and Govinda-rajā, should be respected."

30. But if a maiden Daughter, in whom the succession has vested (and who has been afterwards married), die (without bearing issue), the estate which was hers becomes the property of those persons, a married Daughter or others who would regularly succeed if there were no such (unmarried Daughter) in whom the inheritance vested, and in like manner succeed on her demise after it has so vested in her." Saumchurn shows clearly enough that the words introduced (without bearing issue) form no part of the Daya Bhaga. The decision which Saumchurn has examined is wholly incapable of being supported. An attention to plain principles will easily dispose of it. Whenever a Widow or a Daughter succeeds to ancestral property, they do not take an interest descendible to their heirs, but simply a life estate descendible on the death of either to the heirs of the Husband or Father. *Nuffeir Mitter v. Ramcoemer and others*, 4. S. D. A., p. 310, and *Mussumat Gyan*

Koowur v. Dookurn and others, 4 S. D. A., p. 330. An attention to the principle I have just stated puts an end to the authority of the decision itself.

As anything which falls from Sir William Macnaghten's pen may create erroneous impressions on the minds of students, it may be as well to notice a remark made by him in a note to a case reported at p. 39, S. D. A., Vol. I., which is to the following effect:—"That the authorities followed in the district of Orissa are the same with those of Bengal." This is a mistake; the Mitacshera is the leading authority.

There is also a remark of Sir William Macnaghten's at p. 102 of the first volume: "That in former times, it was the practice to affiliate Daughters, in default of male issue, but the practice is now forbidden." This needs correcting, for at p. 5, Vol. VI., of Select Reports, the marginal note observes: "Notwithstanding what is stated at p. 102, Vol. I., of Macnaghten's Hindoo Law, the adoption of the Daughter of a Brother, with the condition that her eldest Son shall be the 'putrica putra' (Son of a Daughter) of the adopted, is legal. But it is essential to the validity of the adoption that it took place previous to her marriage." Such matters may be easily corrected without impairing the usefulness of Sir William Macnaghten's work.

The question of the right of a Father in Bengal to will away property having been supported by repeated decisions, and sanctioned by the Privy Council, has lately been revived in the case of Tagore v. Tagore. The case arose on the construction of the following Will of Prosono Coomar Tagore, who died at Calcutta on the 30th of August, 1868.

THIS IS THE LAST WILL AND TESTAMENT OF ME, PROSONO COOMAR TAGORE, OF PROSONO COOMAR TAGORE'S STREET, IN THE TOWN OF CALCUTTA, A MEMBER OF THE LEGISLATIVE COUNCIL OF BENGAL. I REVOKE ALL WILLS AND CODICILS BY ME HERETOFORE MADE.

1. I am one of the six sons of Gopey Mohun Tagore, who died in the Bengal year 1225, leaving large real and personal

property, and six sons, namely : Soorjee Coomar Tagore, Chunder Coomar Tagore, Nundo Coomar Tagore, Cally Coomar Tagore, Hurro Coomar Tagore, and myself. Shortly after my father's death the said Soorjee Coomar Tagore died, and by his Will, after certain legacies, gave and bequeathed the residue of his share and property to his five surviving brothers. After the death of Soorjee Coomar Tagore, my mother also died, and what had been set apart for her maintenance under the Will of my father, and also her Streedhun, fell into the family estate. Afterwards the joint family, by a large speculation in opium, and unfavourable decision in a heavy lawsuit, commenced in the lifetime of my father between him and Messieurs Alexander and Company and Messieurs Baretto and Sons, and otherwise sustained very heavy losses, and became involved in debt to a very large amount.

2. On the 16th of Assar, in the Bengallee year 1234 (being the 29th of June, 1827), my surviving brothers and myself came to a partition and division of what remained of the family property, and each took upon him the payment of an allotted portion of the debts and liabilities of the joint estate, and deeds of partition and division in the Bengallee language and character were duly executed. I have ever since been separate in estate, food and worship, and in every respect, from my said brothers and their descendants respectively.

3. The share of the family property allotted to me, and the joint liabilities which I undertook to discharge, were nearly equal; but by industry, by success in trade, and more especially by the emoluments arising from my employment as Government and General Pleader in the Sudder Dewanny Adawlut, I have paid off all those liabilities, and have greatly improved the estate allotted to me in partition, and I have purchased other estates and property, both real and personal, to a large amount in value, the annual profits or income arising from which now exceed two lakhs and fifty thousand Rupees, and are steadily increasing.

4. I have already made such provision for my son, Ganender

Mohun Tagore, as I consider sufficient, and he will take nothing whatever under this my Will.

5. I give, devise, and bequeath all my property, both real and personal, of what nature or kind soever, unto and to the use of Rama Nauth Tagore, Woopender Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee (all residents in the town of Calcutta), their heirs, executors, administrators, representatives, and assigns, according to the nature and tenure of the said property. To have and to hold the same upon the Trusts hereinafter declared of and concerning the same (that is to say), As to such of the said property as shall be personalty, or of the nature of personalty, In Trust to collect and get in the same (save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farm yard, and other articles as the person or persons for the time being beneficially interested in my real estate or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made shall wish to retain for his or their own use), and thereout to pay my funeral expenses and debts and such legacies as may be payable in the ordinary course of administration within one year from the time of my death.

6. And after paying the *said funeral expenses, debts, and legacies upon Trust to sell and convert into money such portion of my said personal estate as shall remain unexpended*, and as shall not consist of money or securities for money, and to stand possessed of the proceeds of such sale and conversion, and of all monies and securities for money then forming part of my estate. In Trust to invest the same or permit the same to remain invested (as the case may be) in the names or name of the said Rama Nauth Tagore, Woopender Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee, or the survivors or survivor of them, or the executors, administrators, or representatives of such survivor (hereinafter called my said Trustees or Trustee) on such good and reliable

securities as to my said Trustees or Trustee shall seem fit, with power to my said Trustees or Trustee from time to time to alter or vary the said securities and investments, or any of them, at their discretion.

7. I desire that my said Trustees or Trustee do and shall out of the interest, dividends, and annual proceeds of the said Trust monies and securities pay the several annuities (except the sum of Rupees 1,000 a month given, as hereinafter directed, for the worship of the Idols) given by this my Will, and also any of the legacies which shall become or be payable after the said Trust monies shall have been invested under the directions hereinbefore contained, so far as the said interest, dividends, and annual proceeds will suffice for these purposes. And after payment of such annuities and legacies, do and shall pay the surplus *unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof.* And so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, *do and shall stand possessed of and interested in the said Trust monies and securities, and the interest, dividends, and annual proceeds thereof.* In Trust *absolutely for the person or persons entitled, under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property.*

8. And as to such of my said estate as shall be realty or immovable property, or of the nature of realty, upon Trust until all my debts and legacies shall have been paid, and all the annuities given by this my Will (except the said sum of Rupees 1,000 a month for the worship of the said Idols) shall have fallen in and been fully satisfied, to receive and collect the rents, issues, and profits thereof, and thereout in the first instance to pay such (if any) of the said legacies and of the said annuities given by this my Will as my said personal estate or the annual income derived from the Trust monies and securities aforesaid shall be inadequate to defray. And to pay the sum of Rupees 1,000

a month for the worship of the said Idols, as hereinafter more particularly directed, and to pay the residue of the said rents, issues, and profits which shall from time to time remain unexpended, after making such payments as aforesaid unto *the person or persons for the time being* to whom (subject to the desire* hereinbefore made to my said Trustees) *I have given and devised the said real estate*, under the limitations and directions hereinafter contained and expressed, for the absolute use of such person or persons respectively.

9. *I desire that my said Trustees or Trustee shall hold the said real estate generally for the use and benefit of such last-mentioned person or persons for the time being, so far as is consistent with the Trusts and provisions by and in this my Will created and contained.* And I further desire and direct out of the net annual income (that is to say of the clear annual income which shall remain after paying all the necessary costs of the management of my estate, including the expense of the establishments in the Mofussil and in Calcutta) of the said real property, the person or persons for the time being entitled, under the limitations and provisions hereinafter contained, to the beneficial enjoyment of the said real property, or of the income or surplus income thereof, receive for his own use every year Rupees 2,500 a month, or 30,000 a year, and that the various legacies and annuities given by this my Will shall only be paid gradually, and as may be found possible by my said Trustees or Trustee out of the balance that shall remain after such last-mentioned payment of the said annual income of the said real property. Provided always that interest at the rate of 5 per cent. per annum shall be paid to every legatee or annuitant whose legacy or annuity, or a portion of whose legacy or annuity, shall be postponed under the provisions and directions immediately hereinbefore contained, until the same shall have been fully paid and satisfied.

10. And so soon as all the legacies and annuities (save and except the said sum of Rupees 1,000 for the worship of the said Idols) given by this my Will shall have fallen in or been paid and fully satisfied, then in Trust *forthwith to convey*

* It should be devise; this is an error in the original.

the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement, without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be).

11. I desire that all the gifts, devises, and limitations in this my Will hereinafter contained and expressed, shall be read and taken as subject to the bequest and devise hereinbefore made by me to my said Trustees or Trustee, and also to the various provisions and declarations made by me with reference thereto.

12. Whereas my father, the late Gopey Mohun Tagore, established certain Idols at Moolla Johur, in the Zillah of Twenty-four Pergunnahs, and gave the Talook Moolla Johur Kuloo Pachry and Ballee Bharee to supply the means of carrying on the worship of the said Idols. And whereas I am now carrying on the said worship, and am paying for the same partly out of my own monies, as the income derived from the said Talook and premises given by Gopey Mohun Tagore as aforesaid is insufficient for the purpose. Now I do give and bequeath the sum of Rupees 1,000 a month for the purposes of the worship of the said Idols, and to be expended thereon in addition to the income accruing from the said Talook and premises given by Gopey Mohun Tagore as aforesaid.

13. I constitute and declare the said sum of Rupees 1,000 a month a permanent and paramount charge upon my real estate and every part thereof, and I direct that the worship of the said Idols shall be conducted and superintended by the said Joteendro Mohun Tagore; in the first instance, so long as he shall be the person entitled for the time being, under the limitations and directions herein contained, to the beneficial enjoyment of my said real estate, or the annual income, or surplus

annual income, derived therefrom, and after the said Joteendro Mohun Tagore shall have by death or otherwise ceased to be so entitled, then by the person or persons successively for the time being entitled to the said real estate, or the beneficial enjoyment of the rents and profits, or surplus rents and profits thereof, under or in pursuance of the limitations or directions contained in this my Will.

14. And I direct further that the income of the Talook and premises given by the said Gopey Mohun Tagore as aforesaid shall be applied for the purposes of the worship of the said Idols and in acts of devotion and charity connected therewith, according to the religion and customs of Hindoos, as the same have been hitherto applied, and that the said sum of Rupees 1,000 a month shall be applied in like manner, and also in supporting and defraying the expenses of any dispensary or charitable institution established by me in my lifetime connected with the said worship.

15. My eldest daughter, Sorrosoondery Dabee, married one Sreenauth Mookerjee, and has since died, leaving a Son, Nongenderbhosun Mookerjee. After her death the said Sreenauth Mookerjee, who has since also died, married my second Daughter, Sreesoondery Dabee, who is now a childless widow. My third and only other daughter, Hemsoondery Dabee, is married to Parbutty Churn Chatterjee. By certain deeds of gift bearing date respectively the 7th of June, 1851, I have made a provision for my second daughter, and the son of my eldest daughter, and for my third daughter and her family.

16. In addition to the provision so made, I direct the sum of Rupees 600 a month (commencing from the date of my decease and the first payment thereof to be made at the end of the first calendar month from the day of my death) to be paid to my said daughters jointly during their joint lives, so long as they shall live together; but in the event of their separating, whether such separation be voluntary during their lives, or be caused by the death of one of them, then from the time of such separation I desire that the sum of Rupees 200 a month shall be paid to my daughter, Sreesoondery Dabee,

during her life, and the sum of Rupees 400 a month shall be paid to my daughter, Hemsoondery Dabee, during her life.

17. And I declare that the said monthly sums bequeathed by me to my daughters, as herein aforesaid, are intended by me to be applied by my said daughters for the maintenance of themselves and their families respectively ; the said Nogenderbhoosun Mookerjee being included in the said family of the said Sreesoondery Dabee.

18. I give and bequeath the sum of Rupees 50,000 to each Son, and Rupees 25,000 to each daughter, living at the time of my death, of any of my said three daughters ; and I direct that the legacy hereby given to each such son or daughter who shall have attained the age of 21 years, shall be paid to him or her, as the case may be, as soon as conveniently may be after my death, and that the legacy hereby given to each and every such son or daughter, who shall not have attained the age of 21 years, shall be invested in Government Securities, in the names or name of my said Trustees or Trustee who shall stand possessed thereof. In Trust to transfer, assign, and make over the same to him or her whose legacy is represented thereby, upon his or her attaining the age of 21 years ; and in the meantime, and until it is so transferred, assigned, and made over in Trust, to receive and accumulate the interest of the said legacy or Government Securities, investing such interest from time to time as circumstances admit in Government Securities also.

19. I give and devise to each son and each daughter living at my death, of any of my said three daughters, and who shall not have attained the age of 21 years, the sum of Rupees 100 per month, until he or she, as the case may be, shall attain the age of 21 years ; and I give and bequeath to each son and each daughter living at my death, of any of my said three daughters, and who shall, at the time of my death, have attained, or who shall after my death attain, the age of 21 years, the sum of Rupees 200 per month, during his or her life, as the case may be. If any son or daughter, or sons or daughters, of any of my said daughters shall be unmarried at the time of my death, I give and bequeath the sum of Rupees

10,000 to each and every such unmarried son and daughter (which shall be payable to the guardian of such son or daughter, if any such guardian there be), for the purpose of paying for his or her marriage, buying jewellery, and defraying the like ordinary expenses. Provided always that such sum of Rupees 10,000 shall not be payable except for or to a person who is actually about to be married.

20. I release and discharge the said Woopender Mohun Tagore and his wife from all monies he and she may owe me at the time of my death, and I give and bequeath the same to them.

21. I give and bequeath to the male descendants, either natural or adopted, of the late Hurry Mohun Tagore, the uterine brother of my late father, who shall be living at the time of my death, the sum of Rupees 60,000, to be equally divided amongst them, the share of each who shall have attained the age of 21 years, to be paid to him as soon as may be after my death, and the share of each who shall not have attained the age of 21 years, to be retained by my Trustees or Trustee, who shall hold the same in Trust, to lay out and invest the same in Government Securities, and to accumulate the interest accruing therefrom, and invest the same from time to time and in Trust, upon his attaining the age of 21 years, to assign, transfer, and make over the fund so invested to him whose legacy is represented thereby.

22. *I direct that each of the legacies and bequests or shares by me hereinbefore made shall be deemed and taken to have vested in the several legatees to whom they are by me bequeathed, immediately upon my death; and that, in case of any of the said legatees dying after my death but before attaining the age at which payment is to be made to them under the provisions herein contained, his, her, or their legacy or share shall be payable as he, she, or they respectively shall by Will direct, or, in case of intestacy, to the personal representatives of such legatees or legatee, as soon as conveniently may be after his or her death.*

23. I give and bequeath to my Sudder Naib and Sudder Mooktear, and to each of my Native Assistants and writers in the English Department of my business, and to my other

Native Assistants and servants employed in my Zemindary Department and Moonshee and Cash Departments in Calcutta, who shall have been in my actual and constant service ten years and upwards at the time of my death, and to each of my domestic servants in Calcutta, who shall have been in my service ten years and upwards at the time of my death, Rupees 100 for every Rupee of monthly salary drawn by them from me respectively; and to each of such persons who shall have been in my service five years and upwards at the time of my decease, but less than ten years, Rupees 50 for every Rupee of monthly salary drawn from me by them respectively; but it is my will that the amount to be paid under the above direction shall be the average of the salaries paid to the said persons during the five years immediately preceding my death.

24. I give and bequeath the sum of Rupees 10,000 to the Calcutta District Charitable Society, and the like sum to the Calcutta Native Hospital, and I desire that the said two sums of Rupees 10,000 respectively shall be invested in Government Securities, and be transferred, assigned, and made over by my said Trustees or Trustee to the Managers, Governors, or Trustees (as the case may be) for the time being of the said District Charitable Society and the said Native Hospital respectively; and that the interest accruing due from the monies so invested shall be applied, from time to time, for the purposes of the said District Charitable Society and the said Native Hospital respectively.

25. I am desirous of founding a Law Professorship, to be called "the Tagore Law Professorship," and of providing an adequate remuneration for the Professor who shall fill the chair provided by me. I direct that my Trustees or Trustee do and shall, as soon as may conveniently be after my death, invest in Government Securities such a sum of money, taken from my personalty, or by degrees from the income of my real estate, at the discretion of my Trustees or Trustee as will produce the monthly sum of Rupees 1,000, and that, when such sum has been invested, the same may be assigned, transferred, and made over to the University of

Calcutta, to be held upon the following Trusts (that is to say): In Trust to pay out of the interest accruing due therefrom the annual sum of Rupees 10,000, by equal monthly payments, to the "Tagore Law Professor" for the time being, and in Trust to apply the residue of the interest in the manner hereinafter mentioned. And I desire that until such sum shall have been so invested and made over as hereinbefore directed, my said Trustees or Trustee shall either from the proceeds of my personal estate, or from the rents, issues, and profits arising from my real property, pay the sum of Rupees 1,000 a month to the University of Calcutta, to be applied by the University in the same manner, and for the same purposes, as the interest to accrue due from the funds which I have hereinbefore directed to be made over to the University. And I declare that the right of appointing a Professor to the said "Tagore Law Professorship," and of removing or dismissing the incumbent therefrom, shall be vested in the Senate of the University. And that the first appointment shall be made so as to begin to take effect not later than the end of one year from the date of my death, my Will is that the "Tagore Law Professor" shall read or deliver yearly, at some place within the Town of Calcutta, one complete course of Law Lectures without charge to the students and other persons who may attend such lectures. Within six months after the delivery of each course of lectures the lectures shall be printed, and not less than 500 copies thereof shall be distributed gratuitously. I desire that the expense of such printing and distribution may be defrayed out of the residue of the annual interest of the said fund. Whatever portion of the residue may remain after defraying the expenses, I desire that it may be devoted to the printing and publication of approved works on Law or Jurisprudence. It is my will that the said "Tagore Law Professorship" shall, save as herein provided, be, as to the kind of law which is to be taught, and in all other matters and things, regulated by and subject to the control of the Senate of the said University.

26. And whereas I am, amongst other property, possessed of and entitled to a Zemindary or Talook called Pergunnah

Patleadah and Kismut Patleadah, in Zillah Rungpore, subject to an annual consolidated Jumma, payable to Government, of Rupees 40,555-13-3; and I am also possessed of and entitled to other estates and property in Zillah Rangpore and other Districts, and also to a Ghaut which I have erected and built on the river-bank side of the Strand Road, in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said Road, and also to the Boitakhanah, house, land, and premises where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and sub-division of estates in Bengal is injurious alike to the families of Zemindars and to the Ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the Ryots and tenants thereof, and I am desirous that such improvement should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same. Now, therefore, I give and devise (subject always to the devise to the said Ramanauth Tagore, Woopender Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee, hereinbefore contained) all the real property of what particular tenure, nature, or kind soever, and also library, horses, carriages, farm yard, furniture of the Boitakhanah, jewels, gold and silver plates, &c., which I shall at the time of my death be possessed of or entitled to, To and for the following uses, and subject to the following provisions and declarations (that is to say): Unto and to the use of the said Joteendro Mohun Tagore, for and during the term of his natural life, and from and after the determination of that estate, To the use of the eldest son of the said Joteendro Mohun Tagore, who shall be born during my life, for the life of such eldest son, and after the determination of that estate, To the use of the first and other sons successively of the said eldest son of the said Joteendro Mohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate,

To the use of the second and other sons of the said Joteendro Mohun Tagore who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively; and upon the failure or determination of that estate, To the use of the first and other sons successively of such second or other sons of the said Joteendro Mohun Tagore, and the heirs male of their respective bodies issuing. So that the elder of the sons of the said Joteendro Mohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and take before the younger of the sons of the said Joteendro Mohun Tagore born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing. And after the failure or determination of the uses and estates hereinbefore limited, To the use of each of the sons of the said Joteendro Mohun Tagore who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing. So that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons, and the heirs male of their and his respective bodies issuing. And after the failure or determination of the uses and estates hereinbefore limited, then To the use of Shourendro Mohun Tagore, the second son of my brother Hurro Coomar Tagore, for the term of his natural life. And after the failure or determination of that estate, then To such uses, and for and upon such limitations, and subject to such provisions, for the use and benefit of the several sons of the said Shourendro Mohun Tagore successively, and the sons and the heirs male of the respective bodies of such several sons successively as are hereinbefore declared respecting the several sons of the said Joteendro Mohun Tagore successively, and the sons or heirs male of their respective bodies successively, as fully as if the same had been here repeated, substituting the name of the said Shourendro Mohun Tagore for the name of the said Joteendro Mohun Tagore. And after the failure or determination of the said several estates and uses

hereinbefore limited, then To the use of the first and other sons of Lullit Mohun Tagore, now deceased, who was the eldest son of my cousin, the late Woomanundun Tagore, and of the several sons of the said first and other sons of the said Lullit Mohun Tagore, and the heirs male of their respective bodies successively, in such manner, and upon such limitations, and subject to such provisions respectively as is and are herein declared respecting the several sons of the said Joteendro Mohun Tagore, and the sons and heirs male of their respective bodies of the said sons of the said Joteendro Mohun Tagore, as fully as if the same were here repeated at length. So that the elder of the sons of the said Lullit Mohun Tagore, and the sons and heirs male of the respective bodies of such sons successively, may be preferred to and take before the younger of the said sons, and the sons and heirs male of the respective bodies of such sons. And after the failure or determination of the said uses and estates, then To the use of the said Woopender Mohun Tagore, the second son of the said Woomanundun Tagore, and of the first and other sons of the said Woopender Mohun Tagore, and the heirs male of the respective bodies of such first and other sons successively, in such manner, and upon such limitations, and subject to such provisions as is and are herein contained and declared respecting the said Joteendro Mohun Tagore, and his several sons, and the heirs male of the bodies of such sons respectively, as fully as if the same were herein repeated at length. So that the elder of the sons of the said Woopender Mohun Tagore, and the sons and heirs male of the respective bodies of such sons successively, may be preferred to and take before the younger of the said sons, and the sons and heirs male of the respective bodies of such sons. And after the determination or failure of the said uses and estates, then To the use of the first and other sons of Brijender Mohun Tagore, now deceased, the third son of the said Woomanundun Tagore, and the several sons of such first and other sons, and the heirs male of the respective bodies of such several sons successively, in such manner, and upon such limitations, and subject to such provisions as is and

are herein declared and contained respecting the several sons of the said Joteendro Mohun Tagore, and the heirs male of the bodies of such sons respectively, as fully as if the same were here repeated at length. So that the elder of the sons of the said Brijender Mohun Tagore, and the sons and heirs male of the respective bodies of such sons successively, may be preferred to and take before the younger of the said sons, and the sons and heirs male of the respective bodies of such sons.

27. Provided always, and I hereby declare, that any and every son adopted according to Hindoo Law shall, in respect of all the devises, limitations, and provisions in this my Will contained, and may be deemed and taken to be a son of the body of his adoptive father, and that in respect of each male child born after a son has been adopted by his father, every such-last mentioned adopted son shall be deemed and taken to be a younger son of the body of his adoptive father within the meaning of this my Will, and shall be capable of so taking as a son or heir male of the body of his adoptive father.

28. Provided also that a son or sons duly adopted by a widow after her husband's death, under and according to directions from such husband to her to adopt a son or sons, shall (whether such son be the first son adopted by such widow in pursuance of directions from her deceased husband, or whether he be a son subsequently adopted by her in pursuance of such directions, but after the death of a first or other son so adopted by her) be in all respects, for the purposes of this Will, taken as an adopted son of such husband, and shall take under this my Will exactly as if he had been adopted by such husband in his lifetime.

29. And I declare that in the construction of this my Will sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and failing descent by adoption, and his issue or heirs male by descent, and failing descent by adoption, shall be preferred to every younger son, and his issue or heirs male by

descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate.

30. And I declare my Will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindoo born and resident in Bengal may give or control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed.

31. Provided always, and I hereby declare, that if any devisee or tenant for life or entail or otherwise, or any person entitled to take as heir by descent or adoption or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government Revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence, in Calcutta, the said Boitakhanah houses and premises where I now reside, and make use and enjoy my library, horses, carriages, farm yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then and immediately thereupon the devise and limitations in this my Will contained and declared shall wholly cease and determine as to him, and the person next in succession to him, under the limitations aforesaid, shall at once succeed, as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government Revenue, or so ceasing to keep up in a due state of repairs, and to use as his residence my said Boitakhanah house, had then died.

32. And I empower and authorize any person (after my said estate shall cease to be vested in my said Trustees or Trustee) for the time being entitled in possession to my said real estate, under the limitations in this my Will contained, to manage and improve the same at their discretion, and to grant

leases or pottahs thereof, or of any parts thereof, for any term of years not exceeding 20 years in possession from the date of making such lease or pottah, and so as the net rent be reserved, and no fine, premium, or salami be given or taken, and so as the lease or pottah contain a proviso or condition for re-entry on non-payment of the rent for a period not exceeding three years after the same shall become due, or on breach of any of the covenants or terms to be contained in such lease or pottah.

33. I hereby authorize and empower my said Trustees or Trustee to manage my estate in all respects at their discretions, and as they shall think most for the benefit of my estate; and I declare that when any difference of opinion shall arise among my said Trustees as to any matter connected with the management of my estate, the opinion of the majority of my said Trustees for the time being shall prevail; and that if they shall be equally divided in opinion, then that the question shall be decided by the casting vote of the said Joteendro Mohun Tagore, and after his death of the eldest Trustee. I direct my said Trustees or Trustee, so long as my said real estate shall remain vested in them, to employ Doorga Persaud Mookerjee, without prejudice to his legacy under this Will, as the Superintendent or Manager for the whole of my estates, who shall manage and transact all the affairs connected therewith, under the supervision and direction of my said Trustees or Trustee, and to whom my said Trustees or Trustee shall pay any such salary as they may think proper, not exceeding in the whole the sum of Rupees 500 a month; and I desire that the persons employed by me in any of my establishments, both in Calcutta and Mofussil, at the time of my death, shall, so far as is possible and consistent with the good management of my estate, be kept on and retained by my said Trustees or Trustee in the same office as that which they hold at the time of my death, or one as similar thereto as circumstances will admit of.

34. And I hereby declare that the receipt of the Trustees or Trustee for the time being, acting in the execution of any of the Trusts hereof, for the purchase-money of property sold, or

for any monies, funds, shares, or securities paid or transferred to them or him in pursuance hereof, or of any of the trusts hereof, shall effectually discharge the purchaser or purchasers, or other the person or persons paying or transferring the same therefrom, and from being concerned to see to the application thereof.

35. And I hereby declare that if the said Trustees hereby appointed, or any of them, shall die in my lifetime, or if they or any of them or any Trustee or Trustees, to be appointed as hereinafter is provided, shall after my death die, or desire to be discharged, or refuse or become incapable to act, then and so often the said Trustees or Trustee (and for this purpose every retiring or refusing Trustee shall be considered a Trustee), may appoint a new Trustee or new Trustees in the place of the Trustee or Trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act. And upon every such appointment the said Trust premises shall be so transferred that the same may become vested in the new Trustee or Trustees jointly with the surviving or continuing Trustees or Trustee, or solely, as the case may require, and every such new Trustee shall (as well before as after the said Trust premises shall have become so vested) have the same powers, authorities, and discretions as if he had been hereby originally appointed a Trustee. Provided always that the number of Trustees shall be kept up to four, and that when a vacancy occurs a new Trustee shall, with the least possible delay, be appointed.

36. And I declare that the Trustees for the time being of this my Will shall respectively be chargeable only with such monies as they respectively shall actually receive, and shall not be answerable for each other, nor for any banker, broker, or other person in whose hands any of the Trust monies shall be placed, nor for the insufficiency or deficiency of any stocks, funds, shares, or securities, nor otherwise for involuntary losses. And that the said Trustees for the time being may respectively reimburse themselves out of the Trust premises all expenses incurred in or about the execution of the aforesaid trusts and powers.

37. And I appoint the said Rama Nauth Tagore, Woopender Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee, Executors of this my Will, and authorize the acting Executors or Executor for the time being of this my Will to satisfy any debts claimed to be owing by me or my estate, and any liabilities to which I or my estate may be alleged to be subject upon any evidence they or he shall think proper, and to accept any composition or security for any debt, and to allow such time for payment (either with or without security) as to the said acting Executors or Executor shall seem fit, and also to compromise or submit to arbitration and settle all accounts and matters belonging or relating to my estate, and generally to act in regard thereto as they or he shall think expedient, without being responsible for any loss thereby occasioned.

38. In Witness whereof I, the said Prosonso Coomar Tagore, have hereunto, and to a duplicate hereof, set my hand, this tenth day of October, in the Christian year One Thousand Eight Hundred and Sixty-two.

Signed and acknowledged by
the said Prosonso Coomar Tagore,
the Testator, as and for his last
Will and Testament, in the
presence of us, being present at
the same time, who, at his
request, in his presence, and in
the presence of each other, have
hereunto subscribed our names
as Witnesses.

M. WYLIE.

A. G. MACPHERSON.

CHAS. W. HATCH.

J. C. MICHAEL.

PROSONSO COOMAR TAGORE.

True Copy.
(Sd.) P. C. Tagore.

THIS IS A CODICIL OF ME, PROSUNNO COOMAR TAGORE, OF PROSUNNO COOMAR TAGORE'S STREET, IN THE TOWN OF CALCUTTA, C.S.I., A MEMBER OF THE GOVERNOR-GENERAL IN COUNCIL IN INDIA, TO MY LAST WILL AND TESTAMENT, BEARING DATE THE 10TH DAY OF OCTOBER, IN THE CHRISTIAN YEAR 1862, AND WHICH I DIRECT BE TAKEN AS PART THEREOF.

1. I give and bequeath the sum of Rupees 10,000 to each son and daughter of my Granddaughter Myasoondery Dabee, by my daughter Hemsoondery Dabee's side, living at the time of my death, and I direct that the legacy hereby given to each such son or daughter who shall have attained the age of 21 years shall be paid to him or her, as the case may be, as soon as conveniently may be after my death, and that the legacy hereby given to each and every such son or daughter who shall not have attained the age of 21 years shall be invested in Government Securities, in the names or name of my Trustees or Trustee who shall stand possessed thereof, In Trust to transfer, assign, and make over the same to him or her whose legacy is represented thereby upon his or her attaining the age of 21 years, and in the meantime and until it is transferred, assigned, and made over, In Trust to receive and accumulate the interest of the said legacy or Government Securities, investing such interest from time to time as circumstances admit in Government Securities also.

2. If any son or daughter, or sons or daughters, of my said Granddaughter Myasoondery Dabee, by my daughter Hemsoondery Dabee's side, shall be unmarried at the time of my death, I give and bequeath the sum of Rupees 5,000 to each and every such unmarried son and daughter (which shall be payable to the guardian of such son or daughter, if any such guardian there be), for the purpose of paying for his or her

marriage ceremony, buying jewellery, and defraying the like ordinary expenses. Provided always that such sum of Rupees 5,000 shall not be payable except for or to a person who is actually about to be married.

3. I direct that each of the bequests by me hereinbefore made shall be deemed and taken to have vested in the several legatees to whom they are by me bequeathed immediately upon my death, and that out of the accumulated interest on the legacies aforesaid shall be defrayed the expenses for the education of those children, and to be paid to the guardians of those children for such purpose, and that in case of any of the said legatees dying after my death, but before attaining the age at which payment is to be made to them under the provisions herein contained, his, her, or their legacy shall be payable as he, she, or they respectively shall by Will direct, or in case of intestacy, to the personal representatives of such legatees or legatee, as soon as conveniently may be after his or her death.

4. In witness whereof I, the said Prosunno Coomar Tagore, have hereunto, and to a duplicate hereof, set my hand, this 23rd day of March, in the Christian year 1868.

Signed and acknowledged by
the said Prosunnocoomar Tagore,
the Testator, as and for a Codicil
to his last Will and Testament,
in the presence of us, being present
at the same time, who at his
request, in his presence, and in the
presence of each other, have here-
unto subscribed our names as Wit-
nesses.

PROSUNNOCOOMAR TAGORE.

G. W. HOYLE,
J. C. MICHAEL.

THIS is a second Codicil to the last Will and Testament of me, Prosonocoomar Tagore, of Prosonocoomar Tagore's Street, Zemindar, and a Companion of Her Majesty's Exalted Order of the Star of India, which bears date the tenth day of October, one thousand eight hundred and sixty-two. Whereas by my said Will I have charged my real estate with the payment of a sum of Rupees one thousand a month for the worship of the Idols established at Moola Johur by my late Father, Gopey Mohun Tagore, in addition to the provisions already existing, and made by my said Father, and also in supporting and defraying the expenses of any Dispensary or Charitable Institution to be established by me in my lifetime, and I have thereby directed that the said worship should be conducted by Joteendro Mohun Tagore, and on his death by other persons in the said Will provided. And whereas by an Indenture of settlement, bearing even date with this Codicil, and made between myself, the said Prosonocoomar Tagore, of the one part, and the said Joteendro Mohun Tagore, and one Shourendro Mohun Tagore, of the other part, I have settled and assured certain Talooks and Zemindaries, and have assigned and transferred certain Government Securities to the said Joteendro Mohun Tagore and Shourendro Mohun Tagore, to be held by them and their heirs and assigns in trust for the purpose of the worship of the said Idols, and in supporting and defraying the expenses of the said Dispensary and Charitable Institution as aforesaid. Now I hereby declare that the provision made in my said Will with regard to the said Idols and Dispensary and Charitable Institution as aforesaid shall be void and inoperative, and I entirely revoke the fifth or other paragraph of my said Will which relates thereto.

And I do by this Codicil also declare and direct that the Executors for the time being of my said Will shall expend the sum of Rupees thirty-five thousand towards defraying the costs of a building to be erected at Moola Johur aforesaid, for the accommodation of the Sanskrit School, mentioned in the hereinbefore recited Indenture of settlement.

And in all other respects I confirm my said Will, in witness

whereof I, the said Prosono Coomar Tagore, have hereunto set my hand, this twenty-fifth day of July, in the Christian year one thousand eight hundred and sixty-eight.

Signed by the said Testator,
Prosono Coomar Tagore, as and
for a second Codicil to be
annexed to his Last Will and
Testament, and to be taken as
part thereof, in the presence of us,
present at the same time, who, at
his request, in his presence, and in
the presence of each other, have
hereunto subscribed our names as
Witnesses.

PROSUNNOCOOMAR TAGORE.

DWARKANATH GOOPTA,
Medical Practitioner.
J. C. MICHAEL.

A plaint was filed in the High Court at Calcutta, on the 17th December, 1868, by Ganendro Mohun Tagore, the Plaintiff in such suit. It stated the death of the Testator, Prosono Coomar Tagore, on the 30th August, 1868, leaving the Plaintiff his only son and heir, according to Hindoo law, and also two widowed Daughters.

1st. Sree Mutty Sree Soonderee Dabee and Sree Mutty Hensoonderree Dabee, and six Grandsons of Daughters of said Testator.

2nd. That at time of making his last Will, and up to time of death, he was possessed of large property, movable and immovable, in Calcutta and in other parts of Bengal, amounting, as Plaintiff believes, to more than fifty lacs of rupees in value on the whole, such property being to a great extent ancestral, and acquired by the use of ancestral property.

3rd. That Testator, on 10th October, 1862, made Will bearing that date, and also, on 23rd March, 1868, and 25th July, 1868, executed two Codicils to the said Will, bearing such last-mentioned two dates, and died on the 30th August, 1868, without having revoked or altered his said Will or the said Codicils.

4th. That the plaint set forth the Will and Codicils in full.

5th. That the said Testator appointed Ramanauth Tagore, Opendro Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee, executors and trustees thereof. That Opendro Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee applied for, and on the 4th September, 1868, obtained, Probate of the said Will from the High Court of Calcutta, and took upon themselves the burthen of administering the estate of the above Testator, and that, as Plaintiff believes, the said Ramanauth Tagore has not in any way acted or intermeddled under the said Will or Codicils.

6th. That Testator inherited considerable ancestral property from his Father, and that the subsequent acquisitions, which he styles self-acquired in his said Will, were recently made with the aid of the ancestral estate, and that no separate accounts were kept by the said Testator in his lifetime of the ancestral and so-called self-acquired property, but that the said ancestral property, and all acquisitions made by him in his lifetime, were by him treated as one and the same.

7th. That there was no Son born of the said Joteendro Mohun Tagore in the lifetime of the Testator, and that there is not now any Son of the said Joteendro Mohun Tagore.

8th. The Defendant Soonendro Mohun Tagore, named in the Will as Shoosendro Mohun Tagore, had a Son born to him at the time of the Testator's death, namely, the Defendant Promotho Coomar Tagore, who is a minor of the age of four years or thereabouts. The said Lollit Mohun Tagore, named in the Will, died in the lifetime of the Testator, leaving Jodoomundan Tagore, his eldest Son, who also predeceased the Testator, leaving the Defendant Surrutchunder Tagore, his Son, a minor of the age of four years or thereabouts at the death of the said Testator.

9th. That at the time of Plaintiff's marriage with one Balla-

soondery Dabee, which took place in 1843, the Testator, on the occasion of such marriage, executed a Deed of Gift, by way of nuptial gift, according to the custom of Hindoos of rank, of a certain share in the zemindary called Koondy, in Zillah Rungpore, the annual income of which was then Rupees 7,000, a copy of the Deed of Gift annexed to plaint.

10th. That on 18th June, 1851, the said Ballasoonderee Dabee died, without leaving any issue her surviving.

11th. That in or about 1851 or 1852, the said Testator rendered to Plaintiff an account of the gains or profits of the said zemindary, which had come to his hands since the date of the Deed of Gift, and that he afterwards paid to the Plaintiff the price of the jewels and ornaments of the Plaintiff's Wife, the said Ballasoonderee Dabee, which had been appropriated by the said Prosono Coomar, and to which, according to Hindoo law, Plaintiff was entitled.

12th. That, save as aforesaid, no provision was made by the Testator for the Plaintiff, but Plaintiff submits that, according to Hindoo law, the estate given on the marriage of a member of a Hindoo family cannot be taken to be in satisfaction of such member's right of maintenance, and that the amount of such jewels and the value of the said zemindary were, considering the value and amount of the said Testator's property, wholly insufficient as a provision for the Plaintiff, his only Son and heir.

13th. That the Plaintiff, in or about the year 1851, became a Christian, and was baptized on the 10th day of July, 1851, and on the 15th day of April, 1852, married one Komala Tagore, then Komala Bonnerjee.

14th. That Plaintiff submits that the trust and limitation in and by the said Will of the said Testator declared of his estate, save so far as the same are for payment of the debts, legacies, and annuities in the said Will mentioned, are wholly void, as being an attempt to create estates and interests unknown to the law and usages of Hindoos, and as tending to a perpetuity, and as being an attempt to make an illegal and inoperative disposition of his property, in contemplation of his decease, and that

the said Testator has died intestate as to the residue of his estate, after the payment of the said debts, legacies, and annuities.

15th. That Plaintiff submits that, in case the Court should be of opinion that such trusts and limitations are not wholly void, and that they are valid so far as they profess to limit an interest in the residuary estate to Joteendro Mohun Tagore for his life, they are wholly illegal and void so far as relates to any estate or interest which, in the events which have happened, can possibly arise, and that the said Testator must be taken to have died intestate as to the residue of his said estate, subject only to the life interest of the said Joteendro Mohun Tagore.

16th. Plaintiff submitted that, so far as the Will purports or professes to pass any ancestral estate of the said Testator, it was wholly void.

17th. Plaintiff submitted that, in case the said Will was valid to any extent, the Plaintiff was entitled to a reasonable maintenance out of the said estate, and that he was not debarred from such maintenance by reason of his having become a Christian.

18th. That Defendants deny that Plaintiff has any right or claim whatsoever to the estate of the said Testator, and claim some estate, right, or interest therein.

19th. That Plaintiff is informed and believes that Defendants, the Executors of the said Testator, or some or one of them, have, against the directions contained in the said Will, sold, or otherwise disposed of, a large amount of Government Securities, otherwise called Company's Paper, and of the corpus of the estate of the said Testator, and have improperly applied the proceeds thereof. Plaintiff apprehends that, unless Defendants are restrained by an injunction from this Honorable Court, there is danger of the estate being wasted, or otherwise dealt with contrary to the directions of the said Testator.

The Plaintiff prayed—

1st. That it should be declared that Plaintiff, as the only son and heir-at-law, was, according to Hindoo law, entitled to

represent the estate of the Testator, with all the incidents thereof.

2nd. That it should be declared that the Testator had no absolute power of disposition by Will of his entire estate, and particularly of his ancestral estate, to the exclusion of the said Plaintiff, and that the Plaintiff, as heir-at-law, was entitled to the same.

3rd. That it might be declared that the trusts and limitations in and by the said Will declared of the residue of the estate of the said Testator, after payment thereof of the funeral and testamentary expenses of the said Testator, and of the legacies and annuities given by the said Will, are wholly void in law and invalid, and that it might be declared that the Testator had died intestate in respect to the said residuary estate, and that the Plaintiff was entitled to the same, or that in case the Court might not decree the Plaintiff to be entitled to such relief, that it might be declared that the trusts and limitations in and by the said Will declared of the said residue were invalid and void in law, save so far as they confer an interest on the said Joteendro Mohun Tagore for life. And that the Plaintiff might be declared entitled to the said residue after the decease of the said Joteendro Mohun Tagore.

4th. That an account might be taken of the movable and immovable property of the said Testator, and of his funeral and testamentary expenses, debts and legacies; and that his property might be applied in a due course of administration by and under the direction of the said Court; and that the right of all parties therein might be declared; and that a Receiver might be appointed to collect and get in the debts and other outstandings due to the estate of the said Testator, and to collect and receive other movable estate of the said Testator; and that in the meantime the Defendants might be restrained by the order and injunction of the said Court from intermeddling with the estate of the said Testator; and that in case the said Joteendro Mohun Tagore might be declared entitled to the possession of any portion of the property of the said Testator for his life, he might be directed to lodge in the said Court a

true and sufficient inventory of all such portion of the said property as may from time to time come to his hands; and that in the event of the Court being of opinion that the Plaintiff was not entitled to an immediate estate or interest in the estate of the said Testator, it might be declared that he, as heir-at-law, was entitled to an adequate maintenance out of the estate, and that the amount should be ascertained and payment deducted out of the estate of the said Testator.

5th. That the Plaintiff might have such further relief as to the Court should seem meet.

That the several Defendants, Opendro Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee, Executors under the Will of the said Testator, Prosonocoomar Tagore, duly appeared and put in their written statement to the following effect:—

1st. They crave to refer to the originals of the Will and Codicils set forth in the plaint.

2nd. They are advised that the Will and Codicils show with sufficient clearness the intentions of the said Testator with regard to the disposal of his property, and that there is nothing in the provisions of such Will and Codicils opposed to law. They are further advised that if any part of the Will is invalid in law, yet the limitations, commencing with the words, "Now therefore I give and devise, subject to the devise to the said Ramanauth Tagore," and ending with the words, "provision or maintenance of any person, male or female, out of the estate," are valid in law and operative.

3rd. The Defendants, as Executors, submit the effect and construction of the said Will and Codicils to the judgment of the said Court, and ask that all necessary directions should be given for the carrying out the trusts of the Will, in so far as they shall be held valid in law.

4th. To the best of Defendants' information and belief, the bulk of the Testator's property was acquired by his own labour and exertions, though not entirely without the aid of any ancestral property; on the other hand, the Testator paid out of his own self-acquired funds his share of the an-

cestral debts, and these Defendants are advised that, according to the Bengal School of Law, it is immaterial whether the Testator's estate was partly ancestral or not.

5th. They submit, as a question for the judgment of the Court, whether property given on marriage can be taken to be in satisfaction of the right to maintenance, and whether the Plaintiff has a right to maintenance out of the Testator's estate, and whether the Plaintiff is put to his election to take maintenance or to take under the Will.

6th. Defendants have not, nor have nor has any of them, sold or disposed of any Government Securities, contrary to the directions of the Will, nor in any way improperly disposed of any proceeds of any Government Securities. They have sold a portion of Government Securities, and have applied the proceeds to the payment of the debts of the Testator.

7th. Defendants submit whether Joteendro Mohun Tagore ought not to have been made a party, in his capacity of the person claiming the first life estate in the residue under the Will, and in that capacity Defendant submits his rights to the judgment of the Court.

That the said Defendant Surrendro Mohun Tagore duly appeared and filed his written statement, setting up the several points in the 1st, 2nd, 3rd, 4th, and 5th statements made by the Executors as aforesaid.

That the said Infants duly appeared by their respective Guardians, and severally submitted their rights and interests to the protection and judgment of the Court.

That the following issues in the cause were settled by the respective Counsel for all the parties :—

1st. Did the plaint disclose a cause of action ?

2nd. Did the Testator die intestate with respect to any, and what portion, of his estate ?

3rd. Whether any, and what part, of the immovable property of the said Testator was ancestral estate, and if so, had the Testator power to dispose thereof by Will ?

4th. Are any, and which, of the gifts and limitations contained in the Will and Codicils of the Testator void in law ?

5th. What are the rights of the parties respectively under the Will and Codicils?

6th. Whether the Plaintiff is entitled to any, and what, maintenance out of the estate of the said Testator?

7th. Whether the Executors, Defendants, have misapplied any, and what portion, of the Testator's estate?

That such proceedings were had in the said suit, that the same came to be heard before the Honorable Mr. Justice Phear, and Counsel on both sides were heard.

That on the 1st day of April, 1869, Mr. Justice Phear, after reviewing the facts of the case, gave judgment to the following effect:—"I am of opinion that the Plaintiff has on all points failed to make out a case, and that his suit ought to be dismissed. It seems to me right, in this case, that the costs of all parties should come out of the estate. The Testator has, for the first time in the history of litigation in this Presidency, made a show of creating an estate tail, and this suit is the legitimate consequence of this novel attempt. The Plaintiff will get party and party costs; the Defendants will get costs as between attorney and client, all on Scale No. 2."

That the said Plaintiff duly appealed to the High Court against the decree of the said Mr. Justice Phear, dated the 1st of April, 1869, for the following reasons:—

1st. That the learned Judge had held that the trusts and limitations made by the Will of the said Testator, declared of the residue of the estate of the said Testator, after the payment thereout of his funeral and testamentary expenses, and of the legacies and annuities given by his said Will, were valid in law, whereas the said Judge ought to have held that the same were invalid and void in law.

2nd. That the said Judge has held that the trusts and limitations in and by the said Will of the said Testator, declared of the said residue, are valid in law, whereas the said Judge ought to have held that the same, save so far as they confer on Joteendro Mohun Tagore an interest in the said residue during his life, are invalid and void in law.

3rd. That the said Judge has held that the limitations

contained in the said Will of the estate of the said Testator, to the use of such of the Sons of the said Joteendro Mohun Tagore who should be born after the Testator's death successively, according to their respective seniorities, and the heir of their respective bodies issuing, or some of such limitations are or is valid in law, and capable of taking effect, whereas the said learned Judge ought to have held that all the said limitations are void in law.

4th. That the said Judge has held that the Plaintiff has not any interest in the estate of the said Testator sufficient to enable him to maintain this suit, whereas the Judge ought to have held that the Plaintiff had an interest in the said estate sufficient to enable him to maintain his suit.

5th. That the said Judge has not declared the rights and interests of Plaintiff, and of the several parties Defendants in this suit, in the estate of the Testator, whereas the said Judge ought to have declared the said several rights and interests.

6th. That the said learned Judge has held that the said Testator had power to dispose of by Will of his ancestral estate in disinheritance of the Plaintiff, his only Son, whereas he ought to have held he had not such power.

7th. That the learned Judge has held that the Plaintiff is not entitled to maintenance out of the estate of the Testator, whereas he ought to have held that he was so entitled.

8th. That the said learned Judge has dismissed the suit of Plaintiff, whereas he ought to have made a decree for the Plaintiff according to his right.

That the Defendants filed a cross objection, under Section 348 of the Code of Civil Procedure, to the judgment of the said Mr. Justice Phear, as follows :—

The Respondents object that there were no circumstances in the case taking it out of the ordinary rule, according to which the costs of suit should follow the result, and that at any rate the Judge ought to have directed the Plaintiff to bear his own costs.

That such proceedings were had in such appeal, that the same came on for hearing before the Honorable Sir Barnes

Peacock and Mr. Justice Norman, and Counsel on both sides were duly heard on behalf of their respective clients.

That on the 1st of September, 1869, the following decree was pronounced:—

This cause coming on the 17th, 26th, 27th, 28th, and 31st days of May last; the 1st, 2nd, 3rd, and 4th days of June last, and this day, on an appeal preferred by the Plaintiff (Appellant), before the Honorable Sir Barnes Peacock, Knight, Chief Justice, and the Honorable John Paxton Norman, one of the Judges of the High Court,

It was ordered and decreed,—

That the decree of the Lower Court, in its ordinary civil jurisdiction, dated the 1st of April last, be, and the same is, hereby reversed. And it is declared that the plaint in this suit does disclose a cause of action. And it was further declared that the Testator, in the pleadings mentioned, did die intestate as to certain portions of his property. And it was further declared that part of the immovable property of the said Testator was ancestral estate, and that he had a right to dispose of the same by Will. And it was further declared that the Plaintiff was not entitled to any maintenance from the estate of the said Testator. And it was further declared that the devises and gifts by the Will of the said Testator to Joteendro Mohun Tagore for life are valid, and that, subject to the trusts and provisions in the said Will contained for payment of the debts of the Testator, and the legacies and annuities bequeathed by Will out of the rents and profits of his real property, he was entitled during his life to the beneficial enjoyment of the real property so devised to him, and of the rents, or surplus rents, thereof. And that under the trusts of the Will he is entitled to receive the sum of Rupees 2,500 a month out of the net rents of the immovable property, and also of the surplus rents of the immovable property, and the unexpended surplus of the interest, dividends, and annual proceeds of the movable property, which shall from time to time remain unexpended, after making the payments directed by the said Will to be made out of the said rents, interests, and dividends. And it was

further declared that the said Joteendro Mohun was entitled for life to use and enjoy the library, carriages, horses, farm yard, furniture, jewels, gold and silver plates, and other articles belonging to the said Testator, except the jewels, household furniture, and other articles which at the time of the death of the said Testator was or were in the personal use of any member or members of the said Testator's family, which by the Will of the said Testator were not, nor should be collected, got in, or sold by the said Trustees and Executors. And it was further declared that it was not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights, so far as they relate to the immovable property, or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

And it was further declared that the Trust as to the personal estate by the said Will directed to be invested or continued in investment by the said Trustees, so far as such Trust relates to the said personal estate, after the annuities and legacies given by the Will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the Plaintiff as the heir and representative of the said Testator. And it was further declared that the first three Defendants, Executors and Trustees, are bound to render to the Plaintiff an account of the rents due from the Testator at the time of his death, and of the rents and profits of the immovable property of the said Testator, and also an account of his movable property, and of the interests and dividends of such movable property, and of the mode in which they have applied the said rents, profits, movable property, interests, and dividends. And it was further ordered and declared that the costs of the parties in the Lower Court (as between attorney and client on Scale No. 2) be paid out of the surplus rents and profits of the real property of the said Testator, and that if such costs have been paid out of the personal estate, the amount thereof be made good to the personal estate out of the said surplus rents and profits of the real estate. And it was further ordered and

declared that the Plaintiff's (Appellant's) costs occasioned by the appeal be taxed as between attorney and client on Scale No. 2, and paid out of the said surplus rents and profits of the real property; and the consideration of the question of the Defendants' costs occasioned by the appeal be reserved until the accounts to be rendered by them have been delivered in. Lastly, that the case be remanded to the Lower Court, with a request that it will try the issue regarding alleged waste, and return its finding thereon, with the evidence, to the Appellate Court.

The following were the reasons given by the Judges in support of the above Decree:—

APPELLATE JURISDICTION.

PRESENT:—

The Hon'ble SIR BARNES PEACOCK, *Knight*, Chief Justice,
and the Hon'ble MR. JUSTICE NORMAN.

THE CHIEF JUSTICE,

THIS is a suit brought by Ganendro Mohun Tagore, the only son of the late Prosunno Coomar Tagore, a Hindoo, against Opendro Mohun Tagore, Joteendro Mohun Tagore, and Doorga Prosaud Mookerjee, who were appointed Executors and Trustees under the Will of the said Prosunno Coomar Tagore dated the 10th day of October 1862, and also against Shourendro Mohun Tagore and others who are devisees under the said Will.

The suit is brought to obtain certain declarations of right and relief to which I shall have to advert more particularly. The above-named Joteendro Mohun Tagore was also a devisee under the said Will, and it was objected that he ought to have been sued in his character of devisee as well as in his character of one of the Executors and Trustees. I am of opinion, however, that there is nothing in that objection, for he is a party to the suit, and as such can defend his

rights as devisee as well as those in his character of Executor and Trustee. It should be remarked that the first three Defendants were not sued *as* Executors and Trustees and that the words Executors and Trustees were used merely by way of description. Furthermore, in par. 7 of the Written Statement of Joteendro Mohun Tagore, he in his character of devisee particularly submits his rights and interests under the Will to the judgment of the Court.

The Will commences as follows: "This is the Last Will and Testament of me Prosunno Coomar Tagore of Prosunno Coomar Tagore's Street in the Town of Calcutta a member of the Legislative Council of Bengal. I revoke all Wills and Codicils by me heretofore made.

"I am one of the six sons of Gopey Mohun Tagore who died in the Bengalee year 1225 leaving large real and personal property and six sons namely Soorjee Coomar Tagore, Chunder Coomar Tagore, Nundo Coomar Tagore, Cally Coomar Tagore, Hurro Coomar Tagore and myself. Shortly after my father's death the said Soorjee Coomar Tagore died and by his Will after certain legacies gave and bequeathed the residue of his share and property to his five surviving brothers. After the death of Soorjee Coomar Tagore my mother also died and what had been set apart for her maintenance under the Will of my father and also her Streedhone fell into the family estate. Afterwards the joint family by a large speculation in opium and unfavourable decision in a heavy lawsuit commenced in the lifetime of my father between him and Messieurs Alexander and Company and Messieurs Barretto and Sons and otherwise sustained very heavy losses and became involved in debt to a very large amount. On the 16th of Assar in the Bengalee year 1234 (being the 29th of June 1827) my surviving brothers and myself came to a partition and division of what remained of the family property and each took upon him the payment of an allotted portion of the debts and liabilities of the joint estate and deeds of partition and division in the Bengalee language and character were duly executed. I have ever

“ since been separate in estate food and worship and in every
 “ respect from my said brothers and their descendants respec-
 “ tively. The share of the family property allotted to me and
 “ the joint liabilities which I undertook to discharge were
 “ nearly equal but by industry by success in trade and more
 “ especially by the emoluments arising from my employment
 “ as Government and General Pleader in the Sudder Dewanny
 “ Adawlut I have paid off all those liabilities and have greatly
 “ improved the estate allotted to me in partition and I have
 “ purchased other estates and property both real and personal
 “ to a large amount in value the annual profits or income
 “ arising from which now exceed two lakhs and fifty thousand
 “ rupees and are steadily increasing.

“ I have already made such provision for my son Ganendro
 “ Mohun Tagore as I consider sufficient and he will take
 “ nothing whatever under this my Will.

“ I give devise and bequeath all my property both real and
 “ personal of what nature or kind soever unto and to the use of
 “ Rama Nauth Tagore, Woopendro Mohun Tagore, Joteendro
 “ Mohun Tagore and Doorga Prosand Mookerjee (all residents
 “ in the Town of Calcutta) their heirs executors administrators
 “ representatives and assigns according to the nature and tenure
 “ of the said property to have and to hold the same upon the
 “ trusts hereinafter declared of and concerning the same that is
 “ to say as to such of the said property as shall be personalty or
 “ of the nature of personalty. In Trust to collect and get in the
 “ same (save and except the jewels household furniture and other
 “ articles in the personal use of the members of my family and
 “ save and except such jewels household furniture books and
 “ libraries carriages horses farm-yard and other articles as the
 “ person or persons for the time being beneficially interested in
 “ my real estate or the income or surplus income arising
 “ therefrom under the limitations and declarations hereinafter
 “ contained and made shall wish to retain for his or their
 “ own use) and thereout to pay my funeral expenses and debts
 “ and such legacies as may be payable in the ordinary course
 “ of administration within one year from the time of my

“ death. And after paying the said funeral expenses debts and
 “ legacies upon Trust to sell and convert into money such
 “ portion of my said personal estate as shall remain unexpended
 “ and as shall not consist of money or securities for money and
 “ to stand possessed of the proceeds of such sale and conversion
 “ and of all monies and securities for money then forming part
 “ of my estate. In Trust to invest the same or permit the same
 “ to remain invested (as the case may be) in the names or name
 “ of the said Ramanauth Tagore, Woopendro Mohun Tagore,
 “ Joteendro Mohun Tagore and Doorga Persaud Mookerjee or
 “ the survivors or survivor of them or the Executors Adminis-
 “ trator or Representatives of such survivor (hereinafter called
 “ my said Trustees or Trustee) on such good and reliable
 “ securities as to my said Trustees or Trustee shall seem fit
 “ with power to my said Trustees or Trustee from time to time
 “ to alter or vary the said securities and investments or any of
 “ them at their discretions. I desire that my said Trustees or
 “ Trustee do and shall out of the interests dividends and annual
 “ proceeds of the said Trust monies and securities pay the
 “ several annuities (except the sum of Rs. 1,000 a month given
 “ as hereinafter directed for the worship of the idols) given by
 “ this my Will and also any of the legacies which shall become
 “ or be payable after the said Trust monies shall have been in-
 “ vested under the directions hereinbefore contained so far as
 “ the said interest dividends and annual proceeds will suffice for
 “ these purposes. And after payment of such annuities and
 “ legacies do and shall pay the surplus unexpended of the said
 “ interest dividends and annual proceeds unto the person or
 “ persons who for the time being shall under the limitations
 “ and directions hereinafter contained and expressed be entitled
 “ to the beneficial enjoyment of my real property or of the rents
 “ and profits or surplus rents and profits thereof. And so soon
 “ as all of the said annuities and legacies shall have fallen in
 “ and been fully paid and satisfied do and shall stand possessed
 “ of and interested in the said Trust monies and securities and
 “ the interests dividends and annual proceeds thereof. In Trust
 “ absolutely for the person or persons entitled under the limita-

" tions and directions hereinafter contained and expressed to the
 " beneficial or absolute enjoyment of my said real property.
 " And as to such of my said estate as shall be realty or immov-
 " able property or of the nature of realty upon Trust
 " until all my debts and legacies shall have been paid and all
 " the annuities given by this my Will (except the said sum of
 " Rs. 1,000 a month for the worship of the said idols) shall
 " have fallen in and been fully satisfied to receive and collect
 " the rents issues and profits thereof and thereout in the first
 " instance to pay such (if any) of the said legacies and of the
 " said annuities given by this my Will as my said personal
 " estate or the annual income derived from the Trust monies
 " and securities aforesaid shall be inadequate to defray and to
 " pay the sum of Rs. 1,000 a month for the worship of the said
 " idols as hereinafter more particularly directed and to pay the
 " residue of the said rents issues and profits which shall from
 " time to time remain unexpended after making such payments
 " as aforesaid unto the person or persons for the time being to
 " whom (subject to the desire * hereinbefore made to my said
 " Trustees) I have given and devised the said real estate under
 " the limitations and directions hereinafter contained and ex-
 " pressed for the absolute use of such person or persons respec-
 " tively. I desire that my said Trustees or Trustee shall hold
 " the real estate generally for the use and benefit of such last-
 " mentioned person or persons for the time being so far as is con-
 " sistent with the Trusts and provisions by and in this my Will
 " created and contained. And I further desire and direct out of the
 " net annual income that is to say of the clear annual income which
 " shall remain after paying all the necessary costs of the manage-
 " ment of my estate (including the expense of the establishments
 " in the Mofussil and in Calcutta) of the said real property the
 " person or persons for the time being entitled under the
 " limitations and provisions hereinafter contained to the bene-
 " ficial enjoyment of the said real property or of the income or
 " surplus income thereof receive for his own use every year
 " Rs. 2,500 a month or 30,000 a year and that the various legacies

* This is a mistake in the original will; it should be "devise."

“ and annuities given by this my Will shall only be paid
 “ gradually and as may be found possible by my said Trustees
 “ or Trustee out of the balance that shall remain after such
 “ last-mentioned payment of the said annual income of the said
 “ real property. Provided always that interest at the rate of
 “ five per cent. per annum shall be paid to every legatee or
 “ annuitant whose legacy or annuity shall be postponed under
 “ the provisions and directions immediately hereinbefore con-
 “ tained until the same shall have been fully paid and satisfied.
 “ And so soon as all the legacies and annuities (save and except
 “ the said sum of Rs. 1,000 for the worship of the said idols)
 “ given by this my Will shall have fallen in or been paid and
 “ fully satisfied then in Trust forthwith to convey the said real
 “ estate and premises unto and to the use of the person who
 “ shall under the limitations and directions herein contained be
 “ entitled to the beneficial interests therein with and subject to
 “ such and the like limitations provisions and directions as are
 “ hereinafter contained and expressed of and concerning the said
 “ real estate so far as the then conditions of circumstances will
 “ permit and so far (but so far only) as such limitations or
 “ directions can be introduced into any deed of conveyance or
 “ settlements without infringing upon or violating any law
 “ against perpetuities which may then be in force and apply to
 “ the said real estate or the conveyance or settlement of it as
 “ last aforesaid (if any such law there shall be).

“ I desire that all the gifts devises and limitations in this
 “ my Will hereinafter contained and expressed shall be read and
 “ taken as subject to the bequest and devise hereinbefore made
 “ by me to my said Trustees or Trustee and also to the various
 “ provisions and declarations made by me with reference thereto.”

By the 12th, 13th and 14th paragraphs, pp. 118 and 119, the
 Testator made provision for certain idols at Moolajohur in the
 24-Pergunnahs, but nothing turns upon that part of the Will,
 as by the 2nd Codicil, dated the 25th day of July 1868, the
 Testator revoked the 5th paragraph of his Will and any other
 paragraph relating to the said idols.

By the 15th, 16th and 17th paragraphs, pp. 119 and 120, the

Testator after reciting that his eldest daughter Sorrosoondory Dabee married Sreenath Mookerjee and had since died leaving a son Nogendro Bhoosun Mookerjee, gave to his second daughter, a childless widow, and his third daughter Hemsoondory Dabee, jointly during their joint lives, the sum of 600 Rupees a month so long as they should live together, and he gave directions as to the proportions in which the said monthly sum should be paid to his said daughters in the event of a separation, whether the same should be voluntary or caused by the death of either of them.

By the 18th, 19th and 20th paragraphs, pp. 120 and 121, large legacies were given to the Testator's Grandchildren and other relations who should be living at the time of the Testator's death, to be invested in certain events in the names of the Trustees during the minorities of the legatees.

The paragraphs are as follows :—

18. "I give and bequeath the sum of Rs. 50,000 to each son
 " and Rs. 25,000 to each daughter living at the time of my
 " death of any of my said three daughters and I direct that the
 " legacy hereby given to each such son or daughter who shall
 " have attained the age of 21 years shall be paid to him or her
 " as the case may be as soon as conveniently may be after my
 " death and that the legacy given to each and every such son or
 " daughter who shall not have attained the age of 21 years
 " shall be invested in Government securities in the names or
 " name of my said Trustees or Trustee who shall stand possessed
 " thereof in Trust to transfer assign and make over the same to
 " him or her whose legacy is represented thereby upon his or
 " her attaining the age of 21 years and in the meantime and
 " until it is so transferred assigned and made over in Trust to
 " receive and accumulate the interest of the said legacy or
 " Government securities investing such interest from time to
 " time as circumstances admit in Government securities also."

19. "I give and devise to each son and each daughter living at
 " my death of any of my said three daughters and who shall not
 " have attained the age of 21 years the sum of Rs. 100 per
 " month until he or she as the case may be shall attain the age
 " of 21 years and I give and bequeath to each son and each

“ daughter living at my death of any of my said three daughters
 “ and who shall at the time of my death have attained or who
 “ shall after my death attain the age of 21 years the sum of
 “ Rs. 200 per month during his or her life as the case may be. If
 “ any son or daughter or sons or daughters of any of my said
 “ daughters shall be unmarried at the time of my death I give
 “ and bequeath the sum of Rs. 10,000 to each and every such
 “ unmarried son and daughter (which shall be payable to the
 “ guardian of such son or daughter if any such guardian there
 “ be) for the purpose of paying for his or her marriage buying
 “ jewellery and defraying the like ordinary expenses. Provided
 “ always that such sum of Rs. 10,000 shall not be payable
 “ except for or to a person who is actually about to be
 “ married.”

20th. “ I give and bequeath to the male descendants either
 “ natural or adopted of the late Hurry Mohun Tagore the uterine
 “ brother of my late father who shall be living at the time of
 “ my death the sum of Rs. 60,000 to be equally divided amongst
 “ them the share of each who shall have attained the age of 21
 “ years to be paid to him as soon as may be after my death and the
 “ share of each who shall not have attained the age of 21 years
 “ to be retained by my Trustees or Trustee who shall hold the
 “ same in Trust to lay out and invest the same in Government
 “ Securities and to accumulate the interest accruing therefrom
 “ and invest the same from time to time and in Trust upon his
 “ attaining the age of 21 years to assign transfer and make over
 “ the fund so invested to him whose legacy is represented
 “ thereby.”

By the 22nd paragraph p. 121, the Testator directed that “each
 “ of the legacies and bequests or shares by me hereinbefore made
 “ shall be deemed and taken to have vested in the several legatees
 “ to whom they are by me bequeathed immediately upon my death
 “ and that in case any of the said legatees dying after my death
 “ but before attaining the age at which payment is to be made
 “ to them under the provisions herein contained his her or their
 “ legacy or share shall be payable as he she or they respectively
 “ shall by Will direct or in case of intestacy to the personal

“ representatives of such legatees or legatee as soon as conveniently may be after his or her death.”

By the 24th and 25th paragraphs, p. 122, the Testator gave Rs. 10,000 to the Calcutta District Charitable Society and a like sum to the Native Hospital, and directed that the amount should be invested in Government Securities and made over by his said Trustees to the Managers Governors or Trustees as the case might be of those charities. He also directed that his Trustees, as soon as conveniently could be after his death, should invest such a sum of money taken from his personalty or by degrees from the income of his real estate, at the discretion of his Trustees, as would produce the monthly sum of Rs. 1,000 for the purpose of defraying the expenses of a law Professorship in the University of Calcutta to be established and called the “ Tagore Law Professorship,” and of the printing and gratuitous distribution of not less than 500 copies of the lectures.

Paragraphs 26 to 32, pp. 123 to 129, contained the following recitals and devises: “ Whereas I am amongst other property possessed of and entitled to a Zemindary or Talook called Pergun-
nah Patleadah and Kismut Patleadah in Zillah Rungpore sub-
ject to an annual consolidated Jumma payable to Government of
Rs. 40,555-13-3 and I am also possessed of and entitled to
other estates and property in Zillah Rungpore and other dis-
tricts and also to a Ghat which I have erected and built on
the river bank side of the Strand Road in Calcutta and also
to land and buildings opposite thereto abutting on and near
to the said road and also to the Boitakhanah house land and
premises where I usually reside and also to various other
parcels of real estate and whereas the frequent division and
sub-division of estates in Bengal is injurious alike to the
families of Zemindars and to the Ryots who are in conse-
quence oppressed by numerous and needy landlords having
conflicting interests whence arise disputes and litigations and
whereas I have bestowed much time and money on the im-
provement of my estates and of the condition of the Ryots
and tenants thereof and I am desirous that such improvement
should continue to go on and should not be interrupted by

“ any division of the said estates or disputes concerning the
 “ same. Now therefore I give and devise (subject always to
 “ the devise to the said Ramanauth Tagore, Woopendro Mohun
 “ Tagore, Joteendro Mohun Tagore and Doorgapersaud Moo-
 “ kerjee hereinbefore contained) all the real property of what
 “ particular tenure or kind soever and also library horses car-
 “ riages farm-yard furniture of the Boitakhanah jewels gold
 “ and silver plates &c. which I shall at the time of my death
 “ be possessed of or entitled to to and for the following uses
 “ and subject to the following provisions and declarations that
 “ is to say : Unto and to the use of the said Joteendro Mohun
 “ Tagore for and during the term of his natural life and from
 “ and after the determination of that estate To the use of the
 “ eldest son of the said Joteendro Mohun Tagore who shall be
 “ born during my life for the life of such eldest son and after
 “ the determination of that estate To the use of the first and
 “ other sons successively of the said eldest son of the said
 “ Joteendro Mohun Tagore according to their respective
 “ seniorities and heirs male of their respective bodies issuing
 “ successively and upon the failure or determination of that
 “ estate To the use of the second and other sons of the said
 “ Joteendro Mohun Tagore who shall be born during my life
 “ successively according to their respective seniorities for the
 “ life of each such sons respectively and upon the failure or
 “ determination of that estate To the use of the first and
 “ other sons successively of such second or other sons of the
 “ said Joteendro Mohun Tagore and the heirs male of their
 “ respective bodies issuing so that the elder of the sons of the
 “ said Joteendro Mohun Tagore born in my lifetime and his
 “ first and other sons successively and the heirs male of their
 “ respective bodies issuing may be preferred to and taken before
 “ the younger of the sons of the said Joteendro Mohun Tagore
 “ born in my lifetime and his and their respective first and
 “ other sons successively and the heirs male of their respective
 “ bodies issuing and after the failure or determination of the
 “ uses and estates hereinbefore limited To the use of each of
 “ the sons of the said Joteendro Mohun Tagore who shall be

“ born after my death successively according to their respective
 “ seniorities and the heirs male of their respective bodies issuing
 “ so that the elder of such sons and the heirs male of his body
 “ may be preferred to and taken before the younger of such
 “ sons and the heirs male of their and his respective bodies
 “ issuing and after the failure or determination of the uses and
 “ estates hereinbefore limited then To the use of Shourendro
 “ Mohun Tagore the second son of my brother Hurro Coomar
 “ Tagore for the term of his natural life and after the failure
 “ or determination of that estate then to such uses and for and
 “ upon such limitations and subject to such provisions for the
 “ use and benefit of the several sons of the said Shourendro
 “ Mohun Tagore successively and the sons and the heirs male
 “ of their respective bodies of such several sons successively as
 “ are hereinbefore declared respecting the several sons of the
 “ said Joteendro Mohun Tagore successively and the sons or
 “ heirs male of their respective bodies successively as fully as
 “ if the same had been here repeated substituting the name of
 “ the said Shourendro Mohun Tagore for the name of the said
 “ Joteendro Mohun Tagore and after the failure or determina-
 “ tion of the said several estates and uses hereinbefore limited
 “ then To the use of the first and other sons of Lullit Mohun
 “ Tagore now deceased who was the eldest son of my cousin
 “ the late Wooma Nundon Tagore and of the several sons of
 “ the said first and other sons of the said Lullit Mohun Tagore
 “ and the heirs male of their respective bodies successively in
 “ such manner and upon such limitations and subject to such
 “ provisions respectively as is and are herein declared respect-
 “ ing the several sons of the said Joteendro Mohun Tagore and
 “ the sons and heirs male of their respective bodies of the said
 “ sons of the said Joteendro Mohun Tagore as fully as if the
 “ same were here repeated at length. So that the elder of the
 “ sons of the said Lullit Mohun Tagore and the sons and heirs
 “ male of their respective bodies of such sons successively may
 “ be preferred to and taken before the younger of the said sons
 “ and the sons and heirs male of their respective bodies of such
 “ sons and after the failure or determination of the said uses

" and estates then To the use of the said Woopendro Mohun
 " Tagore the second son of the said Wooma Nundon Tagore
 " and of the first and other sons of the said Woopendro Mohun
 " Tagore and the heirs male of their respective bodies of such
 " first and other sons successively in such manner and upon
 " such limitations and subject to such provisions as is and are
 " herein contained and declared respecting the said Joteendro
 " Mohun Tagore and his several sons and the heirs male of their
 " bodies of such sons respectively as fully as if the same were
 " herein repeated at length. So that the elder of the sons of the
 " said Woopendro Mohun Tagore and the sons and heirs male
 " of their respective bodies of such sons successively may be
 " preferred to and taken before the younger of the said sons
 " and the sons and heirs male of their respective bodies of
 " such sons and after the determination or failure of the
 " said uses and estates then To the use of the first and other
 " sons of Brijendro Mohun Tagore now deceased the third
 " son of the said Wooma Nundon Tagore and the several
 " sons of such first and other sons and the heirs male of
 " their respective bodies of such several sons successively in
 " such manner and upon such limitations and subject to
 " such provisions as is and are herein declared and contained
 " respecting the several sons of the said Joteendro Mohun
 " Tagore and the heirs male of their bodies of such sons
 " respectively as fully as if the same were here repeated at
 " length. So that the elder of the sons of the said Brijendro
 " Mohun Tagore and the sons and heirs male of their
 " respective bodies of such sons successively may be preferred
 " to and taken before the younger of the said sons and the
 " sons and heirs male of their respective bodies of such sons.
 " Provided always and I hereby declare that any and every
 " son adopted according to Hindoo Law shall in respect of
 " all the devises limitations and provisions in this my
 " Will contained and may be deemed and taken to be a
 " son of the body of his adoptive father and that in respect
 " of each male child born after a son has been adopted
 " by his father every such last-mentioned adopted son

“shall be deemed and taken to be a younger son of the
 “body of his adoptive father within the meaning of this
 “my Will and shall be capable of so taking as a son or heir
 “male of the body of his adoptive father. Provided also
 “that a son or sons duly adopted by a widow after her hus-
 “band’s death under and according to directions from such
 “husband to her to adopt a son or sons shall (whether such
 “son be the first son adopted by such widow in pursuance
 “of directions from her deceased husband or whether he be
 “a son subsequently adopted by her in pursuance of such
 “directions but after the death of a first or other son so
 “adopted by her) be in all respects for the purposes of this
 “Will taken as an adopted son of such husband and shall
 “take under this my Will exactly as if he had been adopted
 “by such husband in his lifetime. And I declare that in the
 “construction of this my Will sons by adoption shall always
 “be deemed younger than and be postponed to sons who
 “are the issue of the body of their father and that the
 “elder line shall always be preferred to the younger and
 “that every elder son of each heir in succession by descent
 “and failing descent by adoption and his issue or heirs
 “male by descent and failing descent by adoption shall
 “be preferred to every younger son and his issue or heirs
 “male by descent or adoption to the exclusion of females
 “and their descendants and to the exclusion of all rights
 “and claims for provision or maintenance of any person male
 “or female out of the estate. And I declare my will and inten-
 “tion to be to settle and dispose of my estate in manner
 “aforesaid as fully and completely as a Hindoo born and
 “resident in Bengal may give or control the inheritance of his
 “estate or a Hindoo purchaser may regulate the conveyance or
 “descent of property purchased or acquired by him and not
 “subject to any law or custom of England whereby an entail
 “may be barred affected or destroyed. Provided always and I
 “hereby declare that if any devisee or tenant for life or entail
 “or otherwise or any person entitled to take as heir by descent
 “or adoption or otherwise or in any manner under the limita-

"tions hereinbefore contained shall permit or suffer the said
 "property so devised and limited as aforesaid or any portion
 "thereof to be sold for arrears of Government Revenue or
 "shall after attaining his majority cease to keep up in a due
 "state of repair and to use as his residence in Calcutta the
 "said Boitakhanah houses and premises where I now reside
 "and make use and enjoy my library horses carriages farm-
 "yard furniture in the said house and jewels gold and silver
 "plates &c. in my use or possession then and immediately
 "thereupon the devise and limitations in this my Will con-
 "tained and declared shall wholly cease and determine as to
 "him and the person next in succession to him under the
 "limitations aforesaid shall at once succeed as if the said
 "person so permitting or suffering the said property or any
 "portion thereof to be sold for arrears of Government
 "Revenue or so ceasing to keep up in a due state of repairs
 "and to use as his residence my said Boitakhanah house
 "had then died and I empower and authorize any person
 "(after my said estate shall cease to be vested in my said
 "Trustees or Trustee for the time being) entitled in posses-
 "sion to my said real estate under the limitations in this
 "my Will contained to manage and improve the same at
 "their discretion and to grant leases or pottahs thereof
 "or of any parts thereof for any term of years not exceed-
 "ing 20 years in possession from the date of making such
 "lease or pottah and so as the net rent be reserved and no
 "fine premium or salami be given or taken and so as the lease
 "or pottah contain a proviso or condition for re-entry on
 "non-payment of the rent for a period not exceeding 3
 "years after the same shall become due or on breach of any
 "of the covenants or terms to be contained in such lease or
 "pottah."

By the 33rd paragraph, p. 129, the Testator gave authority to the Trustees to manage his estates. It runs as follows:—

"I hereby authorize and empower my said Trustees or
 "Trustee to manage my estate in all respects at their discretion
 "and as they shall think most for the benefit of my estate and

“ I declare that when any difference of opinion shall arise
 “ among my said Trustees as to any matter connected with the
 “ management of my estate the opinion of the majority of my
 “ said Trustees for the time being shall prevail and that if they
 “ shall be equally divided in opinion then that the question
 “ shall be decided by the casting vote of the said Joteendro
 “ Mohun Tagore and after his death of the eldest Trustee. I
 “ direct my said Trustees or Trustee so long as my said real
 “ estate shall remain vested in them to employ Doorga Persaud
 “ Mookerjee without prejudice to his legacy under this Will
 “ as the superintendent or manager for the whole of my estates
 “ who shall manage and transact all the affairs connected there-
 “ with under the supervision and direction of my said Trustees
 “ or Trustee and to whom my said Trustees or Trustee shall
 “ pay any such salary as they may think proper not exceeding
 “ in the whole the sum of Rs. 500 a month. And I desire that
 “ the persons employed by me in any of my establishments
 “ both in Calcutta and Moffusil at the time of my death shall
 “ so far as is possible and consistent with the good manage-
 “ ment of my estate be kept on and retained by my said
 “ Trustees or Trustee in the same office as that which they
 “ hold at the time of my death or one as similar thereto as
 “ circumstances will admit of.”

The 35th paragraph, p. 130, provided for a continual succe-
 sion of Trustees by new appointments as follows :—

“ I hereby declare that if the said Trustees hereby appointed
 “ or any of them shall die in my lifetime or if they or any
 “ of them or any Trustee or Trustees to be appointed as here-
 “ inafter provided shall after my death die or desire to be dis-
 “ charged or refuse or become incapable to act then and so
 “ often the said Trustees or Trustee (and for this purpose every
 “ retiring or refusing Trustee shall be considered a Trustee)
 “ may appoint a new Trustee or new Trustees in the place of
 “ the Trustee or Trustees so dying or desiring to be discharged
 “ or refusing or becoming incapable to act and upon every such
 “ appointment the said Trust premises shall be so transferred
 “ that the same may become vested in the new Trustee or

“Trustees jointly with the surviving or continuing Trustees
 “or Trustee solely as the case may require and every such new
 “Trustee shall (as well before as after the said Trust premises
 “shall have become so vested) have the same powers authori-
 “ties and discretion as if he had been hereby originally ap-
 “pointed a Trustee. Provided always that the number of
 “Trustees shall be kept up to four and that when a vacancy
 “occurs a new Trustee shall with the least possible delay be
 “appointed.”

By the same paragraph the Testator appointed the said Ramanath Tagore, Woopendro Mohun Tagore, Jootendro Mohun Tagore and Doorga Persaud Mookerjee Executors of his said Will.

By a first Codicil, dated 23rd March, 1868, further legacies of Rs. 10,000 each were given to the sons and daughters of the Testator's granddaughter, Myasoondory Dabee, by his daughter Hemsoondory Dabee, living at the time of the death of the Testator, to be invested in certain cases in Government Securities in the names of the Trustees during the minorities of the respective legatees; and by the 2nd Codicil to which I have already referred the Testator declared that his Executors should expend the sum of Rs. 35,000 for the erection of a building for the accommodation of a Sanscrit School established by the Testator.

It is alleged in the plaint that the Testator died on the 30th August 1868 leaving the Plaintiff his only son and heir according to Hindoo Law, also his two daughters, the said Sreemutty Sree Soondoory Dabee and Sreemutty Hem Soondoory Dabee, and six grandsons by daughters. According to the terms of the Will the said two daughters become jointly entitled to a monthly sum of Rs. 600, and each of the said grandsons to a legacy of Rs. 50,000, independently of the other legacies given by the Will and Codicil.

It is also stated that the three first-named Defendants took upon themselves the administration of the estate, and that Ramanath Tagore, one of the Executors and Trustees named in the Will, has not in any way acted or intermeddled with the estate

under the Will or either of the Codicils, that there was no son born to the said Joteendro Mohun Tagore in the lifetime of the Testator, and that Joteendro Mohun had not at the time of the filing of the plaint any son, that part of the Testator's estate was ancestral estate, and that his subsequent acquisitions were made with the aid of ancestral property.

Six issues were laid down by the Lower Court for trial. They are as follows :—

First.—Does the plaint disclose any cause of action ?

Second.—Did the Testator die intestate with respect to any and what portion of his estate ?

Third.—Was any and what part of the immovable property of the Testator ancestral estate, and if so had the Testator power to dispose thereof by Will ?

Fourth.—Are any and which of the gifts or limitations contained in the Will and Codicils of the Testator void in law ?

Fifth.—Is the Plaintiff entitled to any and what maintenance out of the estate of the said Testator ?

Sixth.—Have the Executors (Defendants) misapplied any and what portion of the Testator's estate ?

It is not contended nor could it be contended with any hope of success that a Hindoo, according to the Bengal School, is incapable of making a Will. It was attempted to be shown that the Will was void as to ancestral estate and that the Plaintiff is at any rate entitled to maintenance, but those points are in my opinion wholly untenable. The Bengal School makes no distinction as to the right of alienation by Sale, Gift, Will or otherwise between ancestral and self-acquired property. In *Nagulutchmee Ummal v. Gopoo Nadarja Chetty* (6 Moore's Appeals, 344) it was said by Lord Kingsdown : " Throughout Bengal a man who is the absolute owner of property may now dispose of it by Will as he pleases whether it be ancestral or not. So in *Beerpertab Sahee v. Rajenderpertab Sahee*, decided by the Privy Council on 4th March 1868 (9 Weekly Reporter, p. 28), it was said : " It is too late to contend that because the ancient Hindoo treatises make no mention of Wills, a

Hindoo cannot make a testamentary disposition of his property. Decided cases too numerous to be now questioned have determined that the testamentary power exists and may be exercised at least within the limits which the law prescribes for alienation by gifts *inter vivos*. (See also the case of Soorjeemonee Dossee v. Denobundhoo Mullick, 6 Moore's Indian Appeals, 135. Same case, 9 Moore's Indian Appeals, 135.)

I am of opinion that the Plaintiff is not entitled to maintenance. Even if he would have been entitled to it if wholly unprovided for (which I think he would not have been), he cannot have a right to maintenance after the receipt from his father as a nuptial gift of an estate yielding an annual income of Rs. 7,000 a year (as to which see the 9th and 10th paragraphs of the plaint).

It is contended on the part of the Plaintiff that the devise to Joteendro Mohun and all the subsequent devises are void, and the 4th issue raises the question whether any and which of the gifts and limitations in the Will and Codicils are void in law. It will be more convenient to try the 4th issue before the 1st and 2nd. As to the 3rd it is clear that part of the Testator's property was ancestral.

The first estate both in the real and personal estate is created by the devise to the Trustees, by which the whole of the Testator's property both real and personal of what nature and kind whatsoever was devised and bequeathed to them their heirs executors administrators representatives and assigns according to the nature and tenure of the said property to have and to hold the same upon the trusts declared in the Will.

In the 14th paragraph of the plaint the Plaintiff submits that the trusts and limitations save so far as the same "are" for the payment of debts legacies and annuities are wholly "void as being an attempt to create estate and interests unknown to the law and usages of Hindoos and as tending to a perpetuity."

In the third prayer the Plaintiff asks that it may be declared "that the trusts and limitations in and by the said

“ Will declared of the residue of the estate of the Testator
 “ after payment thereof of the funeral and testamentary
 “ expenses of the said Testator and of the legacies and an-
 “ nuities given by the said Will are wholly void in law and
 “ invalid and that the Testator has died intestate in respect
 “ to the said residuary estate and that the Plaintiff is entitled
 “ to the same or that in case the Court may not decree the
 “ Plaintiff to be entitled to such relief it may be declared
 “ that the trusts and limitations of the said residue are invalid
 “ and void in law except so far as they confer an interest on
 “ the said Joteendro Mohun Tagore during his life and that
 “ the Plaintiff may be declared to be entitled to the said
 “ residue after the decease of the said Joteendro Mohun
 “ Tagore.”

It is unnecessary to enter into the consideration whether the trusts so far as they relate to the payment of debts legacies and annuities are valid or not. Their validity to that extent is admitted. I will therefore proceed to examine the case so far as it relates to the first life estate in the real and immovable property, viz. that devised to Joteendro Mohun.

It has been contended that the devise to Joteendro Mohun is void, 1stly, because a Hindoo has no power to devise an estate to trustees for the use of another person ; 2ndly, because a Hindoo cannot by will create a qualified or particular estate, but must, if he devise at all, devise, to use an expression of one of the learned Counsel for the Appellant, his whole bundle of rights ; 3rdly, because the devise infringes the rule of law against perpetuities.

Similar objections have been made with reference to the other devises. The consideration of them so far as they relate to the devise of Joteendro Mohun will suffice for the whole.

With reference to the first objection, viz. as to the power of a Hindoo to devise upon trust, I concur in the conclusion arrived at by the learned Judge who decided the case, and who has pointed out that the contention is curiously inconsistent

with the plaint which submits that the trusts and limitations of the Will are void *except so far as the same are for the payment of debts, legacies, and annuities.*

The case of Coomar Ashima Krishna Deb against Coomar Coomar Krishna Deb was cited in support of the position that a Hindoo could not devise to Trustees. In that case, which is reported in the 2nd volume of the Law Reports, p. 36, I said I am not aware of any rule of the Hindoo law by which grants *inter vivos* or gifts by Will in perpetuity are *expressly* prohibited, but it appears to me that they are quite contrary to the whole scope and intention of the Hindoo law, and that there are no means according to that law by which such gifts or grants can be effected. The Hindoo law so far as I am acquainted with it makes no provision for trusts. In a subsequent part of the same case I said:

“It appears to me that, putting out of the question the case of religious endowments, the consideration of which is wholly unnecessary in the present case, a devise by a Hindoo upon trusts which would be void as a condition is void in the shape of a trust.”

But although the Hindoo law contained no express provision upon the subject of uses or trusts, I see nothing contrary to the spirit and principles of the Hindoo law in a devise to trustees giving a beneficial interest to a person to whom it might have been given by a simple devise without the intervention of Trustees. It may be said of Trusts as it has been said of Wills (in the case of Beer Pertab Sahee v. Rajender Pertab Sahee, to which I have referred (Privy Council Cases, 9 Weekly Reporter, p. 28), that it is too late to contend that all gifts or alienations upon trust are void because the ancient Hindoo law makes no express mention of them. All that I laid down in the case of Ashima Deb was that a devise for a purpose which would be void as a condition would be void in the shape of a trust, and I now add that in my opinion a Hindoo cannot by the intervention of Trustees create any beneficial interest which he could not create in sub-

stance without the intervention of Trustees. I will take for instance the present case. The legacies and annuities were all bequeathed to persons in existence at the time of the Testator's death. They have not been objected to by the heir-at-law and may be assumed to be valid charges upon the rents of the estate without the intervention of Trustees at all. The balance of the net annual income of the immovable estate after paying the necessary costs of management and the sum of Rs. 2,500 a month to the person entitled to the beneficial enjoyment of the property was intended to be applied in aid of the annual income derived from the movable estate if that income should be insufficient for the payment of such of the annuities and legacies as were by the Will directed to be paid gradually. The intention of the Testator in that respect might have been carried out without the appointment of Trustees, and there is nothing contrary to the spirit or policy of the Hindoo law in directing that intention to be carried into effect by means of a Trust.

It was probably considered by the Testator that it would be much more convenient that the management of the estate, the collection of the rents, and payments of the Government Revenue, &c., should be left to Trustees than that each legatee and annuitant should have a separate charge upon the estate for his annuity or legacy to be recovered against the devisees for life or in tail who might be minors when the estates should vest in possession.

Indeed by the very act of charging an estate with the payment of a legacy or annuity the devisee of the estate subject to the charge would be a Trustee for the payment of it. There is no magic in the word Trustee. It does not necessarily imply that the person called Trustee holds the legal estate in the beneficial interest to the *cestui que* trust, and that the latter has the equitable estate only in such beneficial interest under a system of jurisprudence in which complete rights are administered and full justice by a single Court instead of by two different Courts, one administering what is called law while the other administers

what is called equity, each being as much a part of the law of the land as the other. There is no distinction between legal and equitable rights or legal and equitable estates.

The person who has a certain beneficial interest to be received out of an estate may not have a right to the property out of which that interest issues. One man may have a right to manage an estate, to collect the rents and profits, and after payment of the expenses of management to divide the net proceeds amongst others or to retain a share of them himself, others may have a right as legatees or annuitants merely to participate in the net proceeds without having the right to manage the estate or to collect the rents or a right to take and appropriate to themselves exclusively any portion of the whole mass of property whether in money or in kind collected as rent. The holder of the estate is entrusted with it under the confidence that he will perform his duty, and an obligation is imposed upon him by his accepting the estate devised to him subject to the trust or confidence reposed on him. It appears to me that it makes no difference in reality whether an estate devised to a person upon trust out of the net rents to pay legacies or annuities and to retain the surplus for his own use, or is devised to that person charged with or subject to the payment of such legacies or annuities.

I see no reason why a Hindoo should not devise an estate subject to a charge for maintenance or subject to the payments of annuities or legacies to certain persons whether he is bound to provide maintenance for them or not. If he can so charge the estate there is no reason why he should not be allowed to devise it to Trustees upon trust to pay such maintenance or such annuities or legacies out of rents and profits. In the latter case there is an express trust, in the former there is an implied one. If maintenance is charged upon an estate in a case governed by Hindoo law an English Court of Justice would enforce the charge by treating it as a lien on the estate, and a lien creates a trust. (See Story's Equity Jurisprudence, p. 1217; see also *id.* p. 1244.)

The High Court in the exercise of original jurisdiction has not ceased to be a Court of Equity. It administers the same substantive law and the same substantive equity as the late Supreme Court would have administered though it determines all the rights of the parties whether legal or equitable in one suit, and this whether the determination is based on the law of England or on the equity of England or on the Hindoo or Mahomedan law. (See Clause 18 of the Letters Patent of the 14th of May, 1862, and Clause 19 of the Letters Patent of the 28th December, 1865.)

If a Hindoo in Bengal were to devise an estate to his sons charged with the payment of specific monthly sums for his widows or daughters, or daughter's sons, a Court of Justice could not hold that the estate or any part of it passed to the widow or daughters, or daughter's sons. They would merely hold that the estate was vested in the sons subject to the charges for maintenance. A Court such as the late Supreme Court, which was a Court of Common Law and a Court of Equity, could not give the widows and daughters possession of any part of the estate, but would enforce the lien and treat the devisees as Trustees, and they would do the same thing if an estate were devised to Trustees in trust for his minor sons with charge for maintenance for widows and daughters, &c.

The late Supreme Court might possibly have held that the suit, even though depending upon Hindoo law which made no distinction between law and equity, must be brought within its equity jurisdiction because the estate was given to one person and the beneficial interests to others. The High Court in the exercise of original jurisdiction would enforce the charges in the same manner without considering whether the suit to enforce them were within its common law or equity jurisdiction, for that distinction had been abolished. A Court in the Mofussil is not a Court of Equity distinct from a Court of Law. It is governed by the general rules of Equity, justice, and good conscience, which is the law in cases to which no other substantive or express law applies. Equity is as much the law of the land

as any other, and Courts of Justice are maintained by the State to administer that portion of the law which consists of equity as well as any other portion of the law.

Such a Court would enforce payment of the maintenance, holding that the claimant is entitled to it by that law which the Court has to administer, and the High Court would do the same on appeal from a Mofussil Court. (See Letters Patent, s. 21.) Whether you call the holders of the estate Trustees or by any other name, or the charge a lien or by any other name, the charge would be enforced by compelling those to whom the estate passed subject to the charge to pay the amounts charged upon and by making the estate liable in cases in which equity and justice might require it.

It is clear that under the Hindoo law a man to whom an estate is conveyed may not have the beneficial interests in the estate. (See the case of *Gossain v. Gossain*, 6 Moore's Indian Appeals, p. 53.) In that case it was held that where a purchase of real estate is made by a Hindoo in the name of one of his sons the presumption of the Hindoo law is in favour of its being a Benamee purchase, and although in the particular case the conveyance was in English form of lease and release, the son in whose name it was purchased was declared to be a Trustee for the father.

So in *Doorga Prosaud Chowdry v. Tarraprosaud Roy Chowdry* (4 Moore's Indian Appeals, p. 452) the Privy Council on appeal from the Sudder Court, which was not a Court of Law distinct from a Court of Equity, held one man to be a Trustee for another though both were Hindoos. See also *Rajah Nursing Deb v. Rajah Koylas Nauth and others* (9 Moore's Indian Appeals, p. 55) and the case of *Hurry Dass Bonnerjee v. C. S. Hogg* (Indian Jurist, Old Series, p. 86) cited by Mr. Justice Phear. Numerous other cases to the same effect might be referred to if necessary.

By the Roman law every one who had a right to make Will might thereby create a fidee commission (Dig. 30, 12).

I am of opinion that the devises are not void merely upon

the ground that the estates are devised upon trust, and that the Testator had power to create by means of a devise to Trustees such estates and beneficial interests as he could have created without the intervention of Trustees.

As to the 2nd objection there appears to me no doubt that the devise to Joteendro Mohun was valid though it created only a life estate. A question was raised in the case of *Bhoobun Moyee Dabee v. Ram Kishore Acharjee* (10 Moore's Indian Appeals, p. 311), whether a Testator could by Will restrict the interest of his son to a life interest, or could limit the estate over in the event of his son's having no issue male, or on the failure of such issue male to a son of the Testator to be adopted by his widow. But the point was not decided. I am not sure whether the doubt raised had reference to the general right of a Testator to create by Will limited interest or particular estates, or whether it extended only to the case then before the Privy Council of a gift over to an adopted son in case of failure of issue male of a natural born son who survived his father. I see no reason, having regard to the spirit and principle of the Hindoo law, to think that particular estate cannot be created. If a Testator can disinherit his son by devising the whole of his estate to a stranger there seems to be no reason why he should not be able to devise his estate by giving particular and limited interests in the whole of the property to different persons in existence or who may come during his lifetime to be taken in succession as well as by giving his whole interest or bundle of rights in particular portions of lands included in his estate to different persons. But we need not speculate upon this subject. In *Romanpersad v. Mussomut Radha Bibee* (4 Moore's Indian Appeals, p. 137), by an instrument in the nature of a testamentary disposition made by a Hindoo domiciled in the North-West Provinces of Bengal the Testator gave his widow a life estate in all his property, and he directed that after the decease of his widow his brother and after the death of his brother his brother's sons should take one half. But the brother died in the lifetime of the Testator's widow leaving C and D

him surviving. C afterwards died in the lifetime of the Testator's widow. C and D were divided brothers. Upon the death of the Testator's widow, the widow of C, one of the sons of the brother, claimed to be entitled to the share devised to her husband, viz. one half of the moiety. It was held by the Privy Council that C and D the sons of the brother each took a vested interest in one moiety of the half, the actual enjoyment of the expectant interest being postponed till the termination of the life estate, and that it was not necessary that C's share should be redevise into possession during his lifetime to enable his widow to succeed to it. It was further held that even if C and D took a joint interest in the moiety there had been a complete division and separation between C and D, and that consequently C's widow was entitled under the Mitacschera law to succeed to the share which vested in her husband during the life of the Testator's widow. Here then there was an estate for life in the widow of the Testator and vested estates in the two sons of the brothers expectant upon the termination of the widow's life estate. - In that case however all the devisees were in existence at the time of the Testator's death.

As to the 3rd objection that the devise to Joteendro Mohun was void on the ground of perpetuity, and as to similar objections which have been raised with reference to some of the subsequent limitations, we have had very learned and elaborate arguments addressed to us. The case has been argued at considerable length and with great ability by the learned Counsel engaged for the several parties in the suit, but it appears to me that many of the doctrines of the English law, including the rule against perpetuity, have no bearing upon the Will now before us, and that we cannot in a case in which the right of inheritance of a Hindoo is concerned reason by analogy from these doctrines.

For instance, the question has been discussed whether some of the devises are executory devises or contingent remainders, as though the law of contingent remainders could be applicable to the estate of a Hindoo when a contingent remainder must be supported by a freehold estate, and the Hindoo law knows of no

distinction between freehold estates and estates less than freehold. I am at a loss also to understand how the law of executory devises of springing or shifting uses or such modifications of the law of immovable property as sprang up after the Statute of Uses and were dependent on it can be applicable to cases governed by the Hindoo law. It was stated by Mr. Hargrave in his second argument in the *Thelluson* causes that executory devise was not regularly admitted in England earlier than two centuries ago. The rule of perpetuity for circumscribing it is therefore not of earlier date and there are not any statutes for that purpose. It is impossible therefore, he said, that the rule against perpetuity should have been derived from any other source than the discretion of the Judges. For general use and public convenience they admitted executory devise but it was seen that if executory devise or use or trust of a similar nature was permitted without any restrictions great abuses might be generated, for it was settled by the Courts of Law that an executory devise could not be barred by common recovery.

The rule laid down by the Judges to prevent perpetuities, namely, that an estate cannot be tied up for a longer period than a life in being and 21 years afterwards originated in the exercise of discretion. It was evidently an arbitrary one if it had been adopted. With reference to the Hindoo law the 21 years would probably have been 16, the period at which in the case of Hindoos minority ceases. The time fixed by the Indian Succession Act is as regards devises a life in being and 18 years. (See Section 10, and Interpretation Clause, Title "Minority.") It is manifest that the rules against perpetuity as well as the law regarding executory devises were no part of the original Hindoo law, and I cannot see by what means they have become so during the last two centuries. It is unnecessary to go further into this matter. The point appears to have been very clearly settled by the Privy Council in the case of *Bhoobunmoyee Dabee v. Ramkishore Acharjee* (10 Moore's Indian Appeals, p. 308).

In pronouncing judgment in that case Lord Kingsdown said: "It seems to have been considered by the two Judges of

the Sudder Court who decided in favour of the Respondent (certainly by one of them) that the document was to be regarded as a Will and as containing a limitation on failure of male issue of the Testator in the lifetime of Chundrabullee Dabee of the testator to a son to be adopted by Chundrabullee Dabee as a *persona designata*, and one of the Judges in a very elaborate argument refers to Mr. Fearn's celebrated treatise on contingent remainders in order to show that such a devise by the English law would be valid. There is no doubt that by the decisions of Courts of Justice the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal, but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules regulated by Acts of Parliament and adjusted by a long course of Judicial determinations to the wants of a state of society differing as far as possible from that which prevails amongst Hindoos in India. In Juggut Soondorie's case the Lord Justice Turner in delivering the opinion of the Privy Council said: "It may not be improper to observe that with reference to the testamentary power of disposition by Hindoos the extent must be regulated by Hindoo law." (See 8 Moore's Indian Appeals, p. 85.)

The Hindoo law of inheritance is based upon the Hindoo religion and we must be cautious that in administering Hindoo law we do not, by acting upon our notions derived from English law, inadvertently wound or offend religious feelings of those who may be affected by our decisions, or lay down principles at variance with the religion of those whose law we are administering. See the remarks of Lord Wynford in *Mullick v. Mullick* (Knapp's Privy Council Cases, 247) in which I entirely concur.

To introduce our artificial system and to engraft it upon the Hindoo law for Hindoos (even if we were permitted to do so) would create the greatest injustice and the greatest inconvenience. We should introduce a system wholly unknown to the

Hindoos and to the greater part of our Judges in the Mofussil who have to administer the Hindoo law, and we should cause such uncertainty that no man would know what his rights are and no longer could safely advise him upon the subject. Lord Bacon speaking of the Statute of Uses called it a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea in such sort that it is hard to say which barque will suit and which will get to the haven, that is to say what assurances will stand good and what will not (Tracts, 299). If the Hindoo law as to gifts by Will is more strict and limited than the English law of devises the restriction tends to the benefit of heirs-at-law who take jointly and those members of Hindoo families for whom in the absence of a Will provision for maintenance is made. The Hindoo law of inheritance and maintenance is more consistent with the Hindoo religion than any rules which could be adopted by analogy to the English law of primogeniture, of entails, of executory devises, or of contingent remainders.

The devise to Joteendro Mohun is not in my opinion at variance with any principle of Hindoo law. Even according to English law it would give him a vested interest for life subject to the trusts for the payment of debts legacies and annuities and would not be void upon the ground of uncertainty or of its infringing the rule against perpetuity. The right to receive the 2,500 Rupees a month out of the rents vested in him immediately on the Testator's death.

I am of opinion that notwithstanding the devise to the Trustees and to their heirs the intention of the Testator was that Joteendro Mohun should take an immediate vested beneficial interest in the real estate subject to the charges for payment of legacies, annuities, &c. and in the 2,500 Rupees a month which was to be paid to him as a first charge upon the estate. It is to be remarked that the sum of 2,500 Rupees a month was directed to be paid to Joteendro Mohun and that he was to receive the sum, to use the language of the Will; "As the person entitled under the limitations to the beneficial enjoyment of the said real property or of the income or surplus

income thereof," and that the devise to him including the devise of the 2,500 Rupees a month was not dependent upon the contingencies whether he should or should not be living when the legacies and annuities should be completely discharged. In this view of the case the devise to Joteendro Mohun was not bad for uncertainty.

The next question relates to the devises to the sons of Joteendro Mohun to be born or adopted after the death of the Testator. With reference to these I am of opinion that the Testator had no power to create estates in tail and certainly not estates tail descendible as he intended to heirs male of the body according to the rule of primogeniture. The right of inheritance according to Hindoo law is regulated with reference to the spiritual benefits to be conferred on the deceased proprietor. No such estate as an estate tail is known to that law. The statute *de donis* was probably never heard of by a Hindoo, and I see no more reason for contending that an estate in tail can be created according to Hindoo law than there is for a similar contention in respect of an estate in tail female.

The creation of an estate tail well might deprive the deceased owner of many spiritual benefits which could be conferred by others than issue male of the body in the fifth degree of descent and amongst such nearer heirs there are females and heirs claiming through females. Yet no Hindoo would I think say that a devise to a man and the heirs female of the body or to heirs claiming through females to the exclusion of his sons grandsons and great-grandsons would not violate the first principles of the Hindoo law of inheritance. (See the *Daya Bhaga*, various sections of Chapter II.)

It is laid down in s. 6 par. 29 of that chapter that inheritance is in right of benefits conferred and that the order of succession is regulated by the degree of benefit. In par. 17, referring to the text of Menu, in which it is declared that "To three must libations of water be made, to three must oblations of food be given; the fourth in descent is the giver of those offerings but the fifth has no concern with them; to the nearest kinsman the inheritance next be-

longs." The author of the *Daya Bhaga* points out that the fifth in descent not being connected by a single oblation is not the heir so long as a person connected by a single oblation whether sprung from the father's or the mother's family exists. In par. 18 the author shows that the words "To the nearest Sapinda" are not intended to indicate nearness of kin according to birth but nearness according to the presentation of offerings. In default of a son, son's son, son's grandson in the male line therefore the widow and not the son of a great-grandson in the direct male line succeeds. In default of a widow qualified daughters succeed; in default of qualified daughters daughter's sons; in default of daughter's sons the father; in default of the father the mother; after the mother the order of succession is such according to the Bengal School that there are about 43 classes reckoning from the deceased including persons claiming through females who are entitled to succeed (in consequence of the greater spiritual benefits which they can confer upon the deceased) in preference to a son of a great-grandson in the direct male line.

How then can it be supposed that the Hindoo law made any provision for creating estate in tail male either by gift, grant, or Will?

Such estates appear to me to be wholly opposed to the general principles of the Hindoo law. They would deprive the deceased proprietor of benefits to be conferred by females and persons claiming through females as much as estates tail female would deprive him of benefits to be derived through males. If estates tail male can be created there are no means by which the entails can be barred, and thus perpetuities might be created and the free sale and disposition of property prevented unless the Legislature should interfere to remedy so great a political evil. Fines and recoveries as well as the fictions upon which they depend are unknown to the Hindoo law. Real actions are not and never were part of the system of procedure in the *Mofussil*, and Section 18 of Act 31 of 1854, by which fines and recoveries were abolished, expressly declared that the Act should not extend to any case to which the Eng-

lish law was not applicable. Indeed this appears to have been foreseen by the Testator for he declared that the entails were not to be subject to any law or custom of England whereby an entail may be barred affected or destroyed. Primogeniture as a rule of inheritance is unknown to the Hindoo law and its introduction would be entirely opposed to the principle by which equality among the heirs is the spirit. As to this see the judgment of the Privy Council in the case of Soorjcemony Dossee v. Denobundo Mullick (6 Moore's Indian Appeals, 555) and the Daya Bhaga (c. 3, s. 2, verses 24, 25, 26 and 27). Equality among the heirs (said Lord Justice Turner in the case last cited) is as we understand the spirit of that law. Primogeniture and singleness of heirship would also destroy partition of estates which is favoured by the Hindoo law as spiritual benefits are multiplied by partition. A man cannot create a new form of estates or other than the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy. See Schoalasticus case (Plowden 403) cited by Mr. Justice Norman in Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb (2 Bengal Law Reports, 26), Coke upon Littleton, 25 a and 25 b, and Juggut Soondaree's case (8 Moore's Indian Appeals, 66).

In Preston on Estates, p. 416, it is said: "It is not in the power of any person by his own act to entitle another to take as his heir by descent unless the law has imposed that character on him."

At p. 448, speaking of Gavelkind, borough English, and customary lands, the learned author says: "As to property of this kind it would be as fruitless in any owner to attempt to reduce the succession to the standard of the general rules of the common law as it is to attempt to vary the order of succession of property not exempt from these rules. Nor can the order of succession be varied by means of trusts." In the same book, at p. 448, the author proceeds: "In respect of customary lands attempts have been made to vary the order of succession by means of trusts. *No doubt the common law heir may by a trust as he might by a legal limitation properly framed be substi-*

tuted for the customary heir by making the common law heir a purchaser. This can only be by the gift and to the extent within which by the rule against perpetuities the designation of a purchaser would be effectual. Let a descent attach and the customary heir must be preferred. The order of descent cannot be changed in reference to the trust any more than it can be in reference to the legal estate." *Bullen v. Lord Middleton* (9 Modern Reports, 483). "The like observation is applicable to attempts to entail the trust of copyhold or customary lands when the estate cannot be entailed" (*id.* 449). In that case Lord Hardwicke said: "The trust estate of a copyhold can in no case be capable of an entail when the legal estate is not, *it being necessary that there should be the same rule concerning property in law and in equity.* To use technical language the words—heirs male of their bodies issuing—in the Will under consideration were used not as words of purchase but clearly as words of limitation. They were intended to regulate the mode of descent and to substitute the eldest son for the sons jointly and to give eldest sons a preference over younger sons in all cases of succession by descent under the entail and thus to alter the Hindoo law of succession and to constitute persons heirs male of the body under the entail who were not heirs male of the body under the Hindoo law."

Similar arguments apply to the devises to the sons of Shourendro Mohun to be born or adopted after the death of the Testator and the heirs male of their bodies as well as to the devises to the sons of the subsequent tenants for life to be born after the death of the Testator and the heirs male of their bodies. According to this view of the case all the entails intended to be created by the Will are void.

But it is not because the Court cannot legally give effect to the real and actual intentions of the Testator that they would be justified in so construing the Will as to declare that the Testator intended to create estates which it is clear he never intended to create. If the devises which he did intend are contrary to law, and such as he had no legal power to make, they ought to be rejected as void and not be converted by the

Court into devises creating larger estates than the Testator intended.

The learned Judge in the judgment which is now before this Court on appeal held that the devises to the use of the devisees and the heirs male of their bodies issuing were devises of the entire estate of inheritance.

The first devise of this nature which occurs in the Will is the devise to the use of the first and other sons successively of the eldest son of Joteendro Mohun Tagore who should be born during the life of the Testator according to their respective seniorities and the heirs male of their respective bodies issuing successively. There was a similar devise to the use of the first and other sons successively of the second and other sons successively of the said Joteendro Mohun Tagore who should be born during the life of the Testator and the heirs male of their respective bodies issuing *successively*. But as Joteendro Mohun had no son born in the lifetime of the Testator those devises lapsed. It was contended in the course of argument that the Will of the Testator took effect from the time of its execution and not from the time of the Testator's death. But this is immaterial though in my opinion there is no foundation for such a contention.

The next devise to a person and the heirs male of his body was the devise to the use of each of the sons of the said Joteendro Mohun Tagore who should be born after the death of the Testator successively according to their respective seniorities and the heirs male of their respective bodies issuing, &c. The devise although contingent is one in which it is possible that a person may come into existence who will answer the description of the devisee. I shall therefore consider with reference to that class of devises whether it is sufficient to pass the general and absolute estate of inheritance. The learned Judge in support of his view that the words heirs male of the body were sufficient to pass the whole estate of inheritance, considered that a devise to a "person and the heirs male of his body issuing" is equivalent to a devise to a "person his sons and his son's sons," and that these last words are sufficient

according to Hindoo law to convey a complete right of inheritance. He says "It is manifest that the Testator has of design used English legal phraseology, and I think in construing this Will I must assume he understood its technical force. It is therefore important that in specifying the interest which follows on the devise for life he uses words which describe an estate tail; upon this it is urged on behalf of the Plaintiff that the Testator must be taken to intend the creation of an estate tail, and as such a form of property is admittedly unknown in this country and is distinguished by incidents the introduction of which would be subversive of Hindoo proprietary law, therefore the devise in question must fail, and the Plaintiff as heir-at-law would at any rate become entitled to the inheritance on the expiration of the interest. I do not think this argument ought to prevail. It is a maxim in England relative to the construction of Wills that the Court ought to gather the intention of the Testator from that which the Will expressly or by implication declares and should be astute to give practical effect to that intention if it legally can, and I think the same rule should hold here, the assumption that the Testator knew the peculiar meaning of the words which he used is a valuable guide to ascertaining what he intended to express. But having arrived at what he intended to express I must give it the effect which is properly due to it in this Court and not the effect which it might have in the understanding of the Courts at Westminster. Now a devise of property to the use of a person and the heirs male of his body issuing appears to me to be fairly and reasonably interchangeable with and equivalent to a devise to a person his sons and his son's sons. But these last words are those which are usually employed in this country to convey a complete right of inheritance according to Hindoo law. The Testator undoubtedly intends in this place to dispose of the inheritance, and I think the Court ought to treat his words as constituting a gift of the inheritance in the only form of it which is known in the Hindoo law, even although it may be also at the same time evident that he desired to impress upon it qualities in regard

to descent which are foreign to this country and which for that reason it can never bear. It therefore appears to me that the foregoing recited devise amounts to the creation of several successive life interests, each commencing on the termination or failure of the preceding, the whole completed by the gift of inheritance to take effect on the expiration of the last life interest. It is to be observed that by the terms of the devise the takers of these life interests would successively be in being at the Testator's death each ready to enjoy the Testator's bounty as his time should come, while the future taker of the inheritance would be unborn. Thus, to use convenient technical language, the life interests were at that time vested but the devise of the inheritance contingent. Notwithstanding the great respect which I entertain for the opinion of the learned Judge I cannot concur in this view of the case. I quite agree that the Court ought to gather the intention of the Testator from that which the Will expressly or by implication declares. The rule is just as applicable to the Wills of Hindoos as to those of persons of other religions.

This case depends upon the Will of a Hindoo and affects the right of inheritance to the estate of a Hindoo. It must therefore be determined according to Hindoo law (21 Geo. 3, c. 70, s. 17). The fact of the Plaintiff having renounced his religion does not in any way impair or affect his right of inheritance (Act 21 of 1850). It is hardly necessary to cite texts to prove that according to the Hindoo law "the will of the donor is the cause of property." But if authorities were wanting they may be found in the *Daya Bhaga*, c. 4, s. 1, verses 16 and 17. See also *Vyavasta Durpanah*, 606, 794.

In the case of *Soorjeemony Dasse v. Denobundoo Mullick* Lord Justice Turner, speaking of the construction of the Will of a Hindoo, says: "In determining that construction what we must look to is the intention of the Testator. The Hindoo law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor so far as we are aware is there any difference between the one law and the other as to

the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the Testator's wishes but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case the circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to particular disposition a particular effect, it must be assumed that the Testator in the disposition which he has made had regard to that meaning or to that effect unless the language of the Will or the surrounding circumstances displace the assumption." See also *Bhoobun Moyee Dabee v. Ramkishore Acharjee* (10 Moore's Indian Appeals, p. 279, and 3 Weekly Reporter, Privy Council Cases, p. 15). In that case it is said "Effect ought to have been given to Gourkishore's intention, which could be gathered only from the legal and intrinsic signification of the words used by him."

I quite agree with the learned Judge that the Testator did of design use English legal phraseology, and I am quite willing to assume, although it is not necessary for my argument, that he fully understood its technical force. It shows that the Testator intended to create estate tail and not that he intended to pass a general state of inheritance in those cases in which the devise was to a person and the heirs male of his body. He not only used language which according to English legal phraseology would describe an estate tail, but he actually used the very word "entail." His intention appears to have been to create estates tail according to English law, descendible to heirs male of the body according to the rule of primogeniture but not to heirs male of the body according to the Hindoo law, under which all the sons and the sons of deceased sons take jointly. Moreover it was clearly the intention of the Testator that the heirs in tail should not be capable of barring the entail. He says "I declare my will and intention to be to settle and dispose of

my estate in manner aforesaid as fully and completely as a Hindoo born and resident in Bengal may give and control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him and not subject to any law or custom of England whereby an entail may be barred affected or destroyed," and further he declared that if any devisee or tenant for life *or entail* or otherwise should suffer or permit the property devised to be sold for arrears of Government Revenue or should fail to perform certain other conditions the devise should wholly cease as to him, and that the person next in succession under the limitation aforesaid should at once succeed as if the person permitting the property to be sold had then died. Power was also given to the person for the time being in possession after the estate should cease to be vested in the Trustees to grant leases for 20 years upon certain conditions.

Looking at the whole of the expressions in the Will, I am clearly of opinion that it was not the intention of the Testator that a son of Joteendro Mohun born after the Testator's death should take a general and absolute estate of inheritance, which in default of male issue would descend to his heirs general according to Hindoo law in derogation of the rights of the person to whom the estate was subsequently limited. He clearly did not intend that such a son of Joteendro Mohun should take even what under English law would be called "a conditional fee simple," or should be capable of alienating the estate under any circumstances. It seems to be beyond all doubt that the Testator did not really and actually intend that in the event of any such sons not alienating and of his dying without leaving heirs male of his body the estate should descend to his general heirs whether females or males according to the Hindoo law of inheritance without reference to primogeniture. If it should be held to have been the Testator's intention that a son of Joteendro Mohun born after the death of the Testator should take a general and absolute estate of inheritance according to the Hindoo law such son

say might alienate the estate by will or otherwise, and in the absence of such alienation the estate upon the very first descent after the death of such son without issue male might pass to numerous collateral heirs as coparceners according to the Hindoo law of inheritance whether males or females, any one of whom would be entitled to claim partition and, if a male, to sell his own interest, which, if not alienated, would again pass by inheritance to his own heirs according to Hindoo law, female or male as the case might be, however numerous. Thus one of the declared objects of the Testator to prevent the frequent division and sub-division of his estate, which he considered injurious alike to the families of Zemindars and to the Ryots, might be frustrated upon the very first descent of his estate.

I have no doubt that it was in the contemplation of the Testator that the limitation to Joteendro Mohun's sons whether natural born or adopted and the heirs male of their bodies might fail, and that it was his intention that upon such failure, the estate should go over to Shourendro Mohun if he should survive, or pass under the ulterior limitation according to the directions in the Will.

If he would pass a general and absolute estate an adopted son might succeed to the estates and, upon his death without issue, the estate might descend to his widows though they might be minors, or an adopted son succeeding to the estate might alienate it or even devise it to his own natural father or the members of his natural family, and thus pass it away altogether from the family of the Testator to a family of a different name and lineage.

The Testator intended to create qualified estates of inheritance descendible according to the rule of primogeniture, which according to Hindoo law he could not create. The Court cannot properly say that he intended to create general and absolute estates. To do so would be to hold that the Testator intended that which he did not intend and that which was clearly contrary to his intentions; instead of holding that he intended to do that which the Hindoo law would not permit him to do, and consequently that his intentions could not have

effect given to them. It is clear that a conditional fee and especially a conditional fee descendible according to the rule of primogeniture is unknown to the Hindoo law, and is as contrary to the rules and principles of Hindoo law as an estate tail; even if it could be held that under the Hindoo law an estate of inheritance conditional upon the birth after the death of the Testator of a particular class of heirs could be created by Will (which in my opinion it could not), it would be quite contrary to Hindoo law to hold that a conditional fee descendible to heirs male of the body according to the rule of primogeniture could be created, and would be quite as contrary to the intention of the Testator to hold that he intended to pass a conditional fee descendible to the heirs male of the body generally according to Hindoo law as to hold that he intended to pass general and absolute estates of inheritance. It is clear he intended that the sons of Joteendro Mohun should not under any circumstances be capable of selling or alienating the estates by devise or otherwise.

The learned Judge, after stating that it appeared to him that the devises in the Will intended to create successive life interests of each commencing on the termination or failure of the preceding, the whole completed by the gift of inheritance to take effect on the expiration of the last life interest, proceeded to say "I do not know whether this state of things still obtains, or whether since the Testator's death any persons designated by the Will as *ultimate takers of the inheritance have been born*. If they have *not*, the Plaintiff as heir-at-law has for the time the immediate expectation of succeeding to the inheritance on the termination of a life in being, and for that reason has a sufficiently substantial present interest to enable him to ask that the property be protected against waste."

I do not thoroughly understand the meaning of the learned Judge in this part of his judgment. The plaint states that Lolit Mohun Tagore named in the Will died in the lifetime of the Testator leaving Judu Nundon Tagore his eldest son who also predeceased the Testator, leaving the Defendant Surut Chunder his son minor of the age of 4 years or thereabouts

at the time of the death of the Testator. The Defendant Surut Chunder therefore is the son of a son of Lolit Mohun born in the lifetime of the Testator, and he was therefore at the time when the suit was commenced one of the persons to whom an estate tail was intended to be given. If the construction of the learned Judge is correct that the words of entail pass a general estate of inheritance, I do not clearly see how the Plaintiff as heir of the Testator is entitled during the life of the Defendant Surut Chunder to the immediate expectation of succeeding to the inheritance on the termination of a life in being, unless the learned Judge intended to hold that all the estates subsequent to the estates given to Joteendro Mohun's sons born after the death of the Testator are void. Though I do not agree with the learned Judge in his reasons I have arrived at the same conclusion, that subject to the trusts for payment of the funeral and testamentary expenses and of the debts legacies and annuities the Plaintiff as the heir-at-law of the Testator is entitled (not under the Will but notwithstanding the Will) to a general estate of inheritance in reversion in the immovable property of the Testator, and that by the terms of the Will no estate larger than an estate for life has been validly created, and that there is a resulting trust in his favour.

I have gone into these questions not for the purpose of making a declaratory decree as to the rights of the several devisees under the limitations subsequent to the life estate given to Joteendro Mohun, for according to the case of *Lady Langdale v. Briggs* (26 Law Journal, New Series, Chancery, p. 27) the Plaintiff is not I think at present entitled to a declaratory decree against the unborn sons of Joteendro Mohun or the subsequent unborn devisees. I have expressed my opinion upon these matters with reference to the issues laid down and for the purpose of considering whether the Plaintiff is entitled to prevent waste, and in order that I may not be understood as concurring in the view taken by the learned Judge that the words "heirs male of their bodies lawfully issuing," as used in the Will, are words of limitation sufficient to create general estates of inheritance descendible according to

Hindoo law and to pass the whole interest in the property. The cypres doctrine has been referred to in argument. But even admitting that the cypres doctrine can be properly applied in construing the Will of a Hindoo (though according to the principle laid down by the Privy Council for the construction of Hindoo Wills I think it cannot be so applied), it is clear that that doctrine does not warrant the construction put upon the Will by the Court below.

To apply that doctrine so as to construe words of entail as intending to create general and absolute estates of inheritance would be to carry the doctrine of cypres in the construction of a Hindoo Will to an extent to which it has never as yet been carried in the construction of a Will in England.

In *Monypenny v. Dering* (2 De G. Macnaughten and Gordon, 172) the Lord Chancellor (Lord St. Leonards) speaking of the doctrine of "cypres" remarked that the "doctrine was nothing more than that which prevailed in other cases of giving effect to the general intent, but with this difference, that it is not as in them carried into effect at the expense of the particular intent." In the common case he said "there is a valid particular intent and there is a valid general intent, and the particular intent in the view of the Court not effectuating all the intention which they perceived the Testator to have had, they look to his general intent and they effect his general intent at the expense of his particular intent. In applying however the doctrine of cypres nothing is sacrificed."

But if the doctrine be extended to the present case, and it be held that because the qualified estates of inheritance, viz. the intended estates tail male, cannot, according to Hindoo law, be created, the Testator intended to create general and absolute estates of inheritance in the devisees to whom estates tail male were given the Testator's general intent and all the ulterior limitations must be sacrificed. It might with equal reason be held that because the devise of lands in England to A for life with remainder to such of his children as shall attain the ages of 27 is not allowed by the law against perpetuities, a Court would, under the doctrine of cypres, hold that the

Testator intended to create a remainder in the children who should attain 21 in order that the devise might not fail. This would in effect be making a new Will for the Testator instead of giving effect to his declared intentions. Such a devise to children and the limitation over were consequently held absolutely void in the case of *Cambridge v. Rons*, and no effect was given to it.* (See 8 Ves. 12, and 1 Jarman on Wills, 1st Ed. 244.)

In *Lord Dungannon and Smith* (12 Clerk and Finnelly, 625) the Lord Chancellor said: "I never can lend myself to the process of altering a Will for the purpose of framing as it were a new Will in order to put a construction upon it to obviate difficulties arising out of the law against perpetuities." It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and his sons and son's sons, would in the absence of anything showing a contrary intention pass a general estate of inheritance according to Hindoo law. I believe the words usually used in Bengal are "*Pootro Poutradi kreme*," and in the Upper Provinces *nuslun badá nuslun*, the literal meaning of the former being "to sons grandsons &c. in due succession" and of the latter "in regular descent or succession."

A gift by Will of an estate to a man under the Hindoo law, even without any words of limitation, would convey a general estate of inheritance in the absence of words showing a contrary intention. But if a gift should be made by Will or conveyance to a man or to a man and his son and son's sons, and words should be added that the elder line should always be preferred to the younger, and that every elder son of each heir in succession by descent and his issue or heirs male by descent should be preferred to every younger son or his issue or heirs male by descent to the exclusion of females and their descendants, and that in default of sons or son's sons the estate should go over to a third person and his heirs, such gift could not, without doing violence to language, be construed as an expression to vest in the donee a general and absolute estate of inheritance alienable at pleasure and descendible to all heirs

according to Hindoo law, lineal or collateral, male or female as the case might be.

Speaking of the cypres doctrine in the case just referred to at p. 174 the Lord Chancellor said: "I apprehend the rule is this, that neither by implication nor by the doctrine of cypres can an estate be carried to a class or a portion of a class for whom the Testator never intended to provide." Still less can it be carried to a class or to classes which the Testator expressly intended to exclude.

Nothing, as remarked by the Lord Chancellor in *Mony-penny and Dering*, p. 185, is so dangerous with regard to a man's Will as to strike out words which admit of a reasonable interpretation. Yet how can the entire estate of inheritance pass without striking out and giving no effect to the words excluding females, and directing that in the construction of his Will every elder son of each heir in succession by descent and his issue or heir male by descent shall be preferred to every younger son and his issue or heir male by descent, and without also striking out of the limitations intended to take effect on failure or determination of the first intended estate tail?

In the case of *Wright and Pearson* (*Eden's Cases in Chancery*, p. 119) a Testator devised to Trustees and their heirs upon trust for the use of the Testator's nephew Thomas Rayney for life with remainder to Trustees and their heirs to preserve contingent remainders, *with remainder* to the use of the heirs male of the said Thomas Rayney and their heirs, and in default of issue male of the said Thomas Rayney then to the use of the Testator's five grandchildren or such of them as should be living at the time of the failure of the issue male of the said Thomas Rayney as tenants in common and to their respective heirs and assigns.

A question was raised whether the words "with remainder to the use of the heirs male of the body of the said Thomas Rayney *and their heirs*" following the devise to Trustees to preserve contingent remainders were intended as words of purchase or words of limitation, and consequently whether the said Thomas Rayney took

an estate for life or an estate tail. The Lord Keeper said the contention introduced the question whether the heir male of the said Thomas Rayney was intended to take an estate in fee by purchase or an estate in tail by limitation from his father, and with reference to that question he said the Testator is here disinheriting his heir for the sake of preserving his name, and yet it is supposed that after the limitation to Thomas Rayney for life he has given it to the sons of Thomas Rayney in fee without any regard to the succession of the estate or the preservation of his name, but what is more contradictory to the Testator's intending to give a fee to the heirs of the body of Thomas Rayney and shows that the Testator intended manifestly a particular estate is *that he has limited a remainder upon it*, for on a general failure of issue male of Thomas Rayney, he has limited the remainder in fee to his five grandchildren.

In a subsequent part of his judgment he said I think Thomas Rayney (the father) took an estate tail from the intent of the Testator, who plainly intended that his heirs male should not take an estate in fee, which they must do if they take as purchasers. It is true that the words "their heirs or assigns" will on this construction in a great measure be rendered ineffectual. It is a rule never to reject words in a Will if they can stand, yet I must do it in this case to support the Testator's intent, because if I give them their full effect I destroy the substantial provisions in the Will of which the Testator had a thorough understanding. The ground of my determination is the manifest intent of the Testator, and therefore on the whole I am of opinion that Thomas Rayney took an estate tail and not for life only under this Will.

Mr. Fearne has entered into an elaborate discussion in respect of this case, but his remarks do not detract from the weight of it as an authority so far as it bears upon the present case. I use it merely to show the length to which the Lord Keeper went in order to avoid holding that a general estate in fee was intended to be devised to the heirs male of the body of the said Thomas Rayney. In that case the words "heirs of the body" were held to create an estate tail in

Thomas Rayney the father, notwithstanding words of limitation were added to the word "heirs male of the body," and notwithstanding the devise to Thomas Rayney the father was expressly for life, and that there was a limitation over to Trustees to preserve contingent remainders after the life estate given to the said Thomas Rayney. In that case the words of limitation added to the devise to the heirs male of the body, the words "for life" added to the devise to the father, and the limitation to Trustees to preserve contingent remainders were all rejected rather than allow the supposed intention of the Testator to be defeated by giving the heirs of the body a general and absolute estate in fee.

In the present case the words "heirs male of the body" were clearly used as words of limitation and clearly intended to create an estate tail. No words of limitation were added to them as in the case of *Wright v. Pearson*; there are also limitations over to Shourendro Mohun, &c., which will be defeated if the words were held to pass a general estate of inheritance, so that whereas, in the case above cited, words were rejected to avoid holding that a general estate of inheritance was created, in this case the words of limitation over the words introducing primogeniture and excluding females must be rejected in order to give an absolute estate of inheritance. This would be quite contrary to the clear intention of the Testator, who did not intend to create general estate of inheritance that might be sold or alienated at pleasure, and which if not alienated would descend to the general heirs according to the Hindoo law.

If I am right in thinking that the Testator intended that his estates were not to be sold or alienated by Joteendro Mohun's sons (natural or adopted) or to descend to their general heirs lineal or collateral male or female, according to Hindoo law, I should not be justified in putting such a construction on the Will as would allow any of Joteendro Mohun's sons born or adopted after the Testator's death to sell or alienate all his estates, and would render the estates, if not so alienated, descendible to all the heirs of such sons, who in

their turn might sell, divide, or alienate, or transmit the estate to their general heirs according to the Hindoo law of inheritance, whether such heirs might be male or female. I cannot make a new Will for the Testator because he made one which the Hindoo law would not allow to be carried into effect. If he has not devised his estate in the manner which the law allows his heir is entitled where the devises fail. I cannot make new devises in place of those which are void ; all that I can do is to carry the intentions of the Testator into effect according to my understanding of them and so far as the law will allow. I cannot hold that he intended to create estates which from the words used I am sure he never intended to create, and thereby put such a construction upon his Will as would in my opinion entirely frustrate all his expressed intentions.

Is it possible for this Court or for any one to say that if the Testator had known that he could not by law create estates tail descendible according to the course of primogeniture he would have preferred that a son of Joteendro Mohun born after the Testator's death, or a son who might be adopted by Joteendro Mohun in his lifetime, or one who might be adopted by any of Joteendro Mohun's widows after his death, should take an absolute and entire estate of inheritance, which he might alienate at pleasure, which would descend to his collateral heirs however numerous, and which might include widows or other females or the issue of females who would probably not bear the Testator's name in preference to allowing his estates to descend to his own son and heir-at-law ? Whatever conjectures the Court may entertain upon that subject they have no means of forming any certain or definite opinion upon it. A Court of law must construe a man's Will not upon mere speculative doubts but according to just reasoning. See *Soorjeemony Dasse v. Denobundhoo Mullick* (6 Moore's Indian Appeals, p. 553). Even if the Testator had expressed ill-feeling towards his son such a construction as that put upon the Will would not in my opinion be warranted.

An heir-at-law ought not to be disinherited without an express devise over or necessary implication. Mere negative

words are not sufficient to exclude him without an actual gift to some other definite object, and if that actual gift is one which the law does not allow it ought not to be interpreted to mean something which the Testator never intended, so as to disinherit the heir and to deprive him of his just rights.

A mere expression in a Will that the heir-at-law shall not take any part of the Testator's estates is not sufficient to disinherit him, without a valid gift of the estates to some one else. Still less can an heir-at-law be disinherited by words expressing that he is not to take any benefit *under the Will*. He will take by descent and by his right of inheritance whatever is not validly disposed of by the Will and given to some other person.

It was contended by Mr. Paul that the Testator's intention was not so much to benefit the devisees as to disinherit his own son, and to tie up the property in such a manner as to perpetuate his own name, and he alluded to the large legacies to the servants as tending to show that the Testator's main object was to disinherit his son. I see nothing unreasonable in the legacies to the servants, nor any thing beyond what a gentleman of large property might, in a liberal and generous spirit, bestow upon those who had served him faithfully. Besides, there was no necessity to give large legacies to the servants in order to disinherit the heir. *There is nothing to show that the Testator intended to disinherit his son under all circumstances. The Will contains no devise of the ultimate reversion after the determination of the estates which were intended to be created.* This may have been because the Testator supposed that the devisees would tie up the estate for ever. But if they did not do so, the heir-at-law is not the less entitled to succeed.

The rules of construction cannot be strained to bring a devise within the rules of law. *Leake v. Robinson* (2 Merivale's Reports, 390); *Griffiths v. Green* (1 Jacob and Walker, 33). In the latter case the Master of the Rolls said: "We must adhere to the words of the Testator unless we are warranted by the context in putting a different meaning upon them." •

But even if an estate tail descendible according to the rules of primogeniture could, according to Hindoo law, be created, I am of opinion that the devises to the sons of Joteendro Mohun Tagore to be born or adopted after the death of the Testator, were not valid according to Hindoo law. According to that law a donee must be capable of accepting the gift. He must, like an heir-at-law, be a sentient being. I apprehend that according to the general principles of Hindoo law a gift *inter vivos*, or by Will, cannot be made to a person not in existence at the time of the gift, or in the case of a Will at the time of the death of the Testator; and that it cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property by virtue of the gift or devise ceases to be that of the donor or Testator.

The Hindoo law knows nothing of an estate *in nubibus* or of a *Scintilla juris* and with the exception of the case of Soorjeemony Dasse v. Denobundhoo Mullick (9 Moore's Indian Appeals p. 135). I know of no authority which shows that under the Hindoo law executory bequests have been sanctioned as part of the system of Hindoo law. The principle of that law seems to require that property which passes out of one man must immediately vest in another. This point as regards inheritance was considered in the case of Cally Dass and Kissen Chunder Dass (11 Weekly Reporter, Appeals from Original Side, p. 11), and there appears to be no distinction in principle between the creation of property by the annulment of previous right by death and the creation of property by relinquishment of right by gift. The 1st chapter of the Daya Bhaga (see especially verses 4 and 5) shows that the term heritage (*daya*) by derivation signifies "what is given." It points out that the use of the verb *da* (to give) is secondary or metaphorical since the same consequence is produced, viz. that of constituting another property after annulling the previous right of a person who is dead, or gone into retirement, or the like (see also the note to verses 4 and 5). In verse 5 it is said "the word heritage is used to signify wealth in which property dependent on relation to the former owner *arises* on

the demise of that *owner*." Thus it appears that property in the heir must arise immediately upon the death of the ancestor, in the same manner as the property of the donee arises immediately upon relinquishment by the donor.

In a note to pars. 4 and 5 it is said "heritage signifies *what is given*."

Since the verb to give signifies the will "be this no longer mine," which has the effect of vesting property in another, and since that cannot exist in the proposed case (meaning heritage), therefore it here merely signifies any act which has the effect of vesting property in another such as the demise of the former owner, his retirement, &c. (*Ochyta*). "There is not in this instance (speaking of heritage) a relinquishment on the part of the person deceased or retired consisting in the will 'be this no longer mine' and operating to annul the former property." (*Roghoo Nundun Dyatatwa*.)

Again, in a note to v. 5, "the term heritage signifies by acceptation property vested in a relative in respect of wealth in right of relation to its former owner (as son or otherwise) *on the extinction of his property*." (*Roghoo Nundun Dyatatwa*.)

There is nothing to show that after property has ceased by virtue of a gift, to be that of the donor, there can be any contingency or uncertainty as to the person in whom it is to vest, or that the property can be so given by Will as to remain in abeyance or *in nubibus* until the donee comes into existence. The object of the Hindoo law is that the property of a deceased proprietor may be immediately made available for his spiritual benefit and for that of his ancestors. There seems to be no more authority for holding that property can, according to Hindoo law, be given by Will to a person not in existence, or to a person not ascertained at the time of the death of a Hindoo Testator, than there is for holding that a thing can be inherited by a person not in existence or upon a contingency. V. 21 is very important. It says: "The right of one may consistently arise from the act of another, for an express passage of law is authority for it, and that is actually seen in the world, since,

in the case of donation, the donee's right to the thing arises from the act of the giver, namely from his relinquishment in favour of the donee who is a sentient person.

In v. 22 it is said "neither is property created by acceptance, since (if that were so) it would follow that the acceptor was the giver, for gift consists in the effect of raising another's property, and that effect would here (that is to say, if acceptance created property) depend on the donee."

In v. 23 an objection is raised. It is said: "Is not receipt acceptance? for the affix in the word *Swicara* implies a thing becoming what it before was not, and the act of making his own (*swan curvan*) what before was not his constitutes appropriation or acceptance (*swicara*). How then can property be antecedent to that? V. 24, "The answer is, though property had *already arisen* it is now by the act of the donee subsequently recognizing it for his own, rendered liable to disposal at pleasure, and such is the meaning of the term 'acceptance' or 'appropriation.'"

Further learning upon the effect of gift and acceptance under the Hindoo law will be found in 2 Colebrooke's Digest, 510, 511.

The result appears to me to be that a gift cannot operate to pass property unless the donee is in existence, so that as soon as the property is relinquished and passes out of the donor it may vest in the donee. That in the case of a Will would be at the time of the death of the Testator, from which moment the Will operates as a relinquishment. The donee must at that time according to my view of the law be a sentient being. This is only in accordance with reason and common sense, especially where there is no express provision for trusts. I exclude from these remarks a posthumous child of the Testator and a son adopted by a widow of the Testator after the death of her husband. These cases depend upon particular law, and do not extend to posthumous sons of strangers or to sons of strangers adopted by their widows after their death. I do not therefore intend to exclude from the general remarks sons of Joteendro Mohun, &c., to be born or adopted after the death of

the Testator, whether adopted in Joteendro Mohun's lifetime or after his death.

According to the Roman law every being capable of enjoying rights and fulfilling duties was called a *persona* (Justinian's Institutes by Sanders, Introduction, 37, id. 86); and by the same law a person could not devise to a posthumous stranger or to a person not *in esse*. In the strictness of the old civil law a child born after the death of the Testator was incapable of taking as his heir or as a legatee under a testament. He had not at the time of the Testator's death any certain existence and the law said *Incerta persona hæres instituti non potest* (Ulp. Reg. 224), still the child when born might be *suus hæres* of the Testator, and as his *Agnatio* would be considered in law to date from the time of conception and not from that of his birth, the Testator would pass one of his *sui hæredes* if he omitted to include him or exclude him in the Will. Although if he had included him, the posthumous child could not have taken anything. In the course of time the law permitted the posthumous child if a *suus hæres* to become an heir, but the civil law never permitted the posthumous child of a stranger born after the Testator's death to be an heir or legatee (Idem. Book II. Tit. XIII. p. 265).

In like manner, according to the common law of England, a grant could not be made to a person not *in esse* at the time of the grant (Comyn's Digest, Tit. Grant B, 1).

It is there said: "Every person *in esse* at the time may take by grant. But a person not *in esse* at the time of the grant cannot be a grantee as if a grant be to the right heirs of B who is then alive." (See also 1 Sanders on Uses, 128; 2 Blackstone's Commentaries, 168, 169; Fearne on Contingent Remainders, 354-362; William on Real Property, 242-247.) I do not cite these cases for the purpose of showing what the Hindoo law is upon the subject of grants to uncertain persons or to persons not in existence, but merely for the purpose of showing that there is nothing contrary to reason or common sense in the Hindoo law as I read it.

I apprehend that according to that law the donee must be a person in existence in whom the property may vest immediately it ceases by virtue of the gift to be that of the donor; and further that the designation of the donee must be so certain that the latter may be capable of accepting the gift, and that it may be ascertained immediately the property ceases to be that of the donor who is the person intended to be benefited and in whom the property given has vested.

We are not to declare what the law ought to be, or how it can be improved, but what the law is. We are Judges and not Legislators.

The learned Judge who decided this case, on considering whether a gift of the inheritance to a person who was not in existence at the time of the Testator's death, had upon public grounds said: "I think the answer is given with singular completeness by the words of the Privy Council in *Sreemutty Soorjimony Dossee v. Denobundhoo Mullick* (9 Moore's Indian Appeals, p. 135). We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law, in allowing a Testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen if at all immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist."

In that case there was an absolute gift of one-fifth of the Testator's property to each of his five sons, with a gift over on the event of any of the five sons dying without a son or a son's son, the Testator declaring that on such an event neither the widow nor the daughter's son should take any part of his share. It was held that there was a good executory devise (or conditional limitation), and that upon the death of one of the sons without leaving a son or a son's son the estate went over

and did not pass to his widow as his heiress-at-law. In that case no question was raised or decided as to whether an estate could pass by Hindoo law by way of executory devise to a person not *in esse* at the time of the decease of the Testator. There is no doubt that a gift by the Hindoo law may be made upon condition (Shama Churn's Vyavasta Durpana, Octavo edition, 601, 602; Macnaghten's Hindoo Law, vol. 2, c. 8, Case 21, pp. 230, 231). It seems also that a grant may be made upon condition, and that it may cease upon breach of the condition. "If the subject pay not revenue the grant being conditional is annulled by the breach of the condition" (*Vivad bhangarnava* and other authorities; Vyavasta Durpana, 606; Macnaghten's Hindoo Law, vol. 2, c. 8, Case 15, pp. 221-223.)

It also seems that a gift in remainder upon condition is good (see Vyavasta Durpana, p. 607; Macnaghten's Hindoo Law, vol. 2, c. 8, Case 1, pp. 207, 208). But these cases do not show that there can be a gift in remainder or upon condition to a person not in existence.

In the case of *Soorjimony Dossee v. Denobundhoo Mullick*, above cited, the Privy Council held that the conditional limitation which by borrowing terms from English law was called an executory bequest was valid according to Hindoo law. They considered that there was nothing against public convenience, or against the principles of Hindoo law, in allowing a Testator to give property whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which was to happen, if at all, immediately upon the close of a life in being (see 9 Moore's Indian Appeals, p. 135). I do not understand the Lord Justice Knight Bruce by the use of the words "immediately on the close of a life in being" to have intended to lay down that the rules of English law against perpetuities were part of the Hindoo law, otherwise he would probably have added "or within 21 years afterwards." His remarks were made with reference to the facts of the case which was then under consideration. In that case *Soroop Chunder Mullick*, the son who died without leaving male issue living at the time

of his death, so long as he lived, had an absolute estate vested in him by the Will though it was subject to the conditional limitation over. He was *in esse* at the time of the Testator's death. He was capable of accepting the bequest and there was no portion of his fifth share of the estate which was not vested in him, or which could vest, given to his brothers by his father in his lifetime; his brothers also were in existence at the time of the Testator's death.

The question to be determined was, whether the devise over was good, not what persons took under that devise. It was sufficient to hold that the widow of the deceased brother who was the Plaintiff in the suit was not entitled to take her husband's share by descent. It was not necessary to decide whether the sons of a deceased brother not *in esse* at the time of the Testator's death took jointly with the surviving brothers.

In the present case the gift to Joteendro Mohun was only for life, the remainder was given over to his first and other sons to be born after the death of the Testator.

The Hindoo law knows nothing of freehold estates, and consequently it knows nothing of contingent remainders supported by freehold estates. It knows nothing of the statute of Uses. It knows nothing therefore of springing or shifting uses, or of executory devises.

There were no means provided by the Hindoo law for creating a perpetuity, it was therefore unnecessary for it to provide against perpetuities.

If the devise over to the unborn sons of Joteendro Mohun was valid, there was no person in existence independently of the Trustees in whom that portion of the estate which was given to the unborn sons could vest by virtue of the gift, or who was capable of accepting any estate created by executory devise or conditional limitation.

The case of Soorjeemony Dossee v. Denobundhoo Mullick is binding upon this Court as to all cases in which the facts are similar, but I do not consider that it was intended to lay down as a general rule that the law of England as regards either

executory devises or perpetuities has been so far recognized in practice as to have become part of the Hindoo law, current in Bengal, and part of the law according to which the rights of inheritance of Hindoos are to be determined, or by which heirs may be disinherited.

If such was the intention it appears to be at variance with the later decision in 10 Moore's Indian Appeals, p. 308, to which I have already referred. The estate which the survivors of the joint family, according to the decisions of the Privy Council in Denobundhoo Mullick v. Soorjeemony Dossee took under the Will, was similar to the estate which the survivors of a joint family in ancestral property take under the law of inheritance as laid down in the Mitacshera. (See the Sheva Gunga Case, 9 Moore's Indian Appeals, p. 539.)

If however the Privy Council intended to lay down that the English law of executory devises has become part of the Hindoo law, there seems to be nothing to prevent the creation of perpetuities unless the English law against perpetuities has also become part of the Hindoo law.

If I am correct in holding that there is no rule of Hindoo law expressly providing against perpetuities, and that the English law has not been engrafted upon the Hindoo law, very serious and inconvenient consequences may be the result of holding that the English law of executory devises is to be administered as part of the Hindoo law, and that devises can be made in trust for persons not in existence whether in possession or in remainder.

We must take care not to introduce our English notions into cases governed by Hindoo law, and not to give effect to rules by which perpetuities may be created, unless we are at the same time prepared to hold that the law against perpetuities is part of the Hindoo law.

It was contended that the estate having been given to the Trustees and their heirs the rule of Hindoo law requiring the devisee to be *in esse* at the time of the Testator's death would not apply, as the Trustees were *in esse*, and capable of accepting.

But the law will not permit that to be done indirectly which cannot lawfully be done directly.

In 1 Jarman on Wills, p. 247, it is said as the law does not permit to be done indirectly what cannot be effected in a direct manner, the rule which forbids the giving of an estate to the issue of an unborn person equally invalidates a clause in a settlement or Will containing limitations to existing persons for life with remainder to their issue in tail empowering Trustees on the birth of each tenant in tail to revoke the uses and limit an estate for life to such infant with remainder to his issue. 1 Jarman on Wills, 247; *Duke of Marlborough v. Earl Godolphin* (1 Eden, 404); see also *Preston on Estates*, 448; *Bullen v. Lord Middleton* (9 Modern Reports, 483).

If the intervention of Trustees will enable a Testator to create estates which he could not otherwise create, and to devise to a person unborn, or not ascertained at the time of the Testator's death, there is nothing to prevent a Testator under the Hindoo law from devising to the unborn son of A for life, remainder to the unborn sons of such son in succession for life according to seniority, remainder in like manner to the unborn grandsons of such son for life, and so on, nor is there anything to prevent a devise to Trustees in trust to keep up a perpetual succession of Trustees, to accumulate the rents and to hand them over to an unborn person who at the end of 100 years after the Testator's death shall be his nearest male heir or shall be the owner of a particular zemindary.

The devisee in the last case, though unborn and unascertained at the time of the Testator's death, is capable of being ascertainable at the time at which the beneficial interest is to commence. If an estate cannot be given directly to an unborn person or to the heirs in succession of an unborn person for life, such estates cannot be given indirectly by means of the intervention of Trustees or otherwise.

If it be held that particular estates such as estates for life can be created by Hindoo law, and that remainders dependent on life estates can be devised to unborn persons for life, with

remainder over to other unborn persons for life, we should in effect allow Hindoo Testators to do by Will that which the Indian Succession Act does not allow other Testators to do (See Act 10 of 1865, s. 100).

This, though no reason for holding that such a devise cannot be made according to Hindoo law if the right be clear, is a good ground to induce us to be cautious before we hold that such a right exists by Hindoo law. For the above reasons in addition to those already given, in considering whether the intended estates tail were valid, I am of opinion that the sons of Joteendro Mohun to be born or adopted after the death of the Testator do not take general estates of inheritance as held by the Court below, or any other valid estate.

The clause which directs the Trustees to convey the real estate so far as the limitations and conditions can be introduced, without infringing any law against perpetuities, does not render the devises to the unborn sons of Joteendro Mohun valid, or vest in the Trustees the power of creating by conveyance valid estates in such sons for life or otherwise. The clause does not authorize a conveyance omitting the directions or provisions in respect of primogeniture or the clause excluding females, nor does it authorize the creation of estates for life or general estates of inheritance instead of qualified estates.

Further, the estates are not to be conveyed until after the legacies and annuities shall have fallen in and been fully satisfied. The estates intended to be given are not merely executory. It was clearly intended that the payment of Rs. 2,500 a month to the persons mentioned in the devises should commence immediately after the death of the Testator and before the legacies and annuities should be satisfied. If the devisees in tail could not take the Rupees 2,500 a month and the surplus interest and dividends, &c., before the legacies and annuities are satisfied and fall in, they cannot take the estates by means of a conveyance to be executed after the legacies and annuities have fallen in. Further, the authority to convey so far only as the limitations can be introduced into a deed without infringing the law against perpetuities (if any such there be) cannot authorize the Trustees

to substitute new limitations or estates valid under the Hindoo law for limitations or estates which the Testator intended to create, but which could not be created and held under that law nor can it render valid either before or after the legacies and annuities are paid those devises which are void so long as the annuities and legacies are unpaid. The Court cannot alter the limitations in a Will by directing a conveyance which will not carry out the intentions of the Testator because those intentions are contrary to law. The only alteration which the Testator intended, was, such as might be necessary to prevent an infringement of the law against perpetuities in conveying the estates which he intended to create. See as to this point *Bagshaw v. Spencer*, *Fearne's Contingent Remainders*, by Butler, 9th Ed., p. 120; and *Garth v. Baldwin* (2 Vesey Senior, 655) and Mr. Fearne's consideration of the cases in which the Court of Chancery in decreeing the execution of trusts has departed from the legal operation of the words by which the trusts were limited (*Fearne's Contingent Remainders*, same edition, p. 113, Ed. 183-185).

A further question arises whether the life estates to Shourendro Mohun, and the other devisees for life are void or valid or are accelerated by the invalidity of the devises in tail male to the unborn sons of Joteendro Mohun.

It is not necessary for the purposes of the present suit to decide that question; and as according to *Lady Langdale's* case above cited we ought not to make any decree declaratory of the right of the parties subsequent to the life estate given to Joteendro Mohun, we abstain from expressing an opinion upon that point, which is not necessary at present. I have expressed my opinion as to the limitations to the heirs male of the body in the devises to the unborn sons of Joteendro Mohun in order that I may not be supposed to acquiesce in the doctrine of the Lower Court that those words pass general or absolute estates of inheritance.

We come now to the personalty; and here I may observe that there is an important distinction between the real estates

and the personalty. With regard to the latter there was no gift of the corpus except in the direction as to the trust upon which the same was to be held by the Trustees as soon as all the annuities and legacies should have fallen in and been fully satisfied. It was declared that as soon as that event should take place the Trustees were to stand possessed of and interested in the corpus in trust absolutely for the person or persons entitled under the limitations in the Will to the beneficial or absolute enjoyment of the said real property.

The words "or persons" are not very intelligible, as the real estates were not intended to be taken jointly by several heirs but by one person only, viz. by the heir male of the body in the elder line. It appears to me that the words "or persons" must be rejected, and that it was the intention of the Testator that when the annuities and legacies should have been fully satisfied the corpus of the movable estate was to be held absolutely for the person who might then be entitled to the beneficial or absolute enjoyment of the immovable estate. There was to be no life interest in the corpus of the personalty and no particular or qualified estate in such corpus. If the legacies and annuities should be fully satisfied in the lifetime of Joteendro Mohun he was to be entitled to an absolute interest in it. He was to be entitled to alienate it, or in the event of his not doing so it would pass upon his death to his representatives. It was not given to the person in whom the first beneficial interest for life in the real estate should vest under the Will. It was to remain a matter of doubt and uncertainty until the legacies and annuities should be fully satisfied who was to be entitled to it. It was to be held in trust for the person or persons who at the moment when the legacies and annuities should have been fully satisfied or fallen in might happen to be the person entitled to the beneficial or absolute enjoyment of the real property. It was a mere possibility which depended upon the contingency whether Joteendro Mohun or any other of the devisees might ever become entitled to it. If the devisees named in the Will should all die without issue male of their bodies either adopted

or otherwise before the legacies and annuities should be fully paid the corpus would revert to the Testator's heir as undisposed of, and there would be a resulting trust in his favour. The person who was to succeed to the corpus might be Joteendro Mohun, or he might be a son of Joteendro Mohun born after the death of the Testator; he might be a son or other heir male of the body of such son or he might be a son adopted by Joteendro Mohun in his lifetime, or a son who might be adopted after the death of Joteendro Mohun by his widow, or he might be a son or heir male of the body of either of such sons. Shourendro Mohun or any of the persons named or designated under any of the subsequent limitations might be the person who under the contingency might become entitled to it.

There was no intention to give it to any particular or ascertained person of the whole of those who under the limitations in the Will might according to the intentions of the Testator become entitled to the absolute and beneficial enjoyment of the real estate upon the happening of the contingency. Many of them were not in existence, and as to some of them, such as sons of the several tenants for life or in tail to be born or adopted after the Testator's death, it was not even certain that they ever would come into existence, nor was it certain that the event upon which the property was to vest would happen within the period of a life in being or 21 years afterwards.

In *Bagshaw v. Spencer* (Fearn's *Contingent Remainders*, pp. 121, 122) Lord Hardwicke speaking of a devise said:—As to its being considered an executory devise it was too remote to be good in that view, being after all debts indefinitely should be paid which in point of time might exceed a life or lives in being or any other time allowed by law. (See also *Jones v. Morgan*, *Brown's Cases in Chancery*, 276; *Fearn's Contingent Remainders*, 134.)

In that case the Testator devised certain real estates to Trustees to raise money in aid of his personalty for payment of debts, and after payment of his debts the estate was limited

over. Lord Chancellor Thurlow said: "The first use for the payment of debts might absorb the whole estate." (See also *Lord Dungannon v. Smith*, 12 Clark and Finnelly, 546; *Boughton v. Boughton*, 1 House of Lords Cases, 404.) In cases of this nature possible, and not actual, events must be looked to.

The same rule of construction must be applied to this case as ought to be applied if the legacies amounted to a crore of rupees, and the incomes of the real and personal estate together were 500 rupees a year. No one can say how long it will be before the corpus of the personal estate is to vest, or who will be the person then entitled to it.

It seems clear that if this case had to be decided according to English law the bequest would be bad for remoteness according to the decisions above cited.

In *Lord Dungannon v. Smith* the ground on which the gift failed was the want of certainty that the bequest would take effect within the prescribed period. In the present case it appears to me that the ground on which the gift fails under Hindoo law is the want of certainty at the time of the death of the Testator who would be the donee, and whether the donee was a person in existence or not.

No one until the whole of the legacies and annuities are satisfied could accept the gift or sell or dispose of the corpus subject to the charges. If such a bequest as the present is good and no rule against perpetuities exists under the Hindoo law there is no reason why a Hindoo may not give and devise his movable and immovable property to such person as at the expiration of 200 years shall be the beneficial owner of a particular zemindary, and either dispose of the rents and profits in the meantime or leave them to accumulate.

The remarks made by Mr. Baron Rolfe in delivering his opinion in *Lord Dungannon v. Smith* (12 Ch. and Fen. 573) are very applicable to this case. He said the Testator has in effect directed his Trustees to retain the corpus in their own hands until some person answering the description of heir male of the body of B shall attain his age of 21, and then, but not till

then, to assign the corpus to such person. In this case the Trustees are to retain the corpus of the movable property in their own hands until some one of the persons to whom the real estate is limited shall, after the payment of the legacies and annuities, answer the description of the person entitled to the beneficial or absolute enjoyment of the real property, and then, but not till then, to hold it for the absolute use of such person. If the rents of the real estate had not been charged in aid of the personalty with the payment of the legacies and annuities, the happening of the event upon which the corpus of the personalty would be liable to be so disposed of would probably be very far distant. I say probably, because we know nothing beyond the recital in the Will as to what is the amount of the income of the personalty and of the surplus which may be available to satisfy the legacies and annuities.

The learned Judge appears to have considered that the annuities and legacies must all be satisfied during lives in being, but that is not so; if the assets should not be sufficient to pay all the legacies in the lifetime of the legatees the legacies will have to be paid gradually, as directed by the Will, to their personal representatives after their death (see Clause 11 of the Will). There is no power to sell any portion of the real, or of the personal estate, after it has been invested to pay the legacies.

The learned Judge says: "The Plaintiff's counsel maintains that under the operation of this clause (meaning the clause for payment) the functions of the Trustees might remain in full force for a period much beyond any life in being. On the whole, though with some doubt, I think this view is not correct. It seems to me better to conclude that the Testator merely meant to free the Trustees from the obligation of paying such legacies and annuities in cash immediately on their becoming due, if they could not be paid in full out of the income at that time. With a view to preserving the corpus intact he gave them the power of adjusting the payments to the income. But I don't think he intended the duties of the Trustees to continue beyond the life of the last annuitant, and in this way to

give them the opportunity of charging the legacies and annuities into rent charges of uncertain duration."

The learned Judge however does not appear to have adverted sufficiently to the 11th Clause of the Will, in which the Testator directed that "each of the legacies and bequests or shares shall be deemed and taken to have vested in the several legatees to whom they are bequeathed immediately upon his death, and that in case of any of the said legatees dying after his death but before attaining the age at which payment was to be made to them under the provisions contained in the Will, his, her, and their legacy or share should be payable as he, she, or they should respectively by Will direct; in case of intestacy to the personal representatives of such legatees or legatee as soon as conveniently might be after his or her death." There is also a provision in the Will that interest at the rate of 5 per cent. shall be paid, "provided always," the Will says, "that interest at the rate of 5 per cent. per annum shall be paid to every legatee or annuitant whose legacy or annuity or a portion of whose legacy or annuity shall be postponed under the provisions and directions immediately hereinbefore contained until the same shall have been fully paid and satisfied."

It is manifest, from the clauses just quoted, that the duties of the Trustees were to continue until the whole of the legacies should be paid, either to the legatees or their devisees, or to their personal representatives, which (as the legacies were to be paid gradually out of the income of the Testator's real and personal estate) might embrace a period long after the death of the legatees and after the death of the survivor of the annuitants.

Further, the corpus of the personalty is so bequeathed that the person in whom it was intended to vest as the beneficial owner of the real estate might be one of the persons intended by the Testator to take the real estate under the devises which have been held void. For the above reasons I am of opinion that the gift over of the corpus of the personalty after the payment of the legacies and annuities was bad, and consequently that the property in it is vested in the son and heir of the Tes-

tator, subject to the trusts for the payment of debts, legacies, and annuities. There is a distinction between the corpus of the personalty and the surplus interests and dividends thereof. The latter is to be paid to the person beneficially entitled to the beneficial enjoyment of his real property or of the rents and profits or surplus rents and profits thereof. Joteendro Mohun is that person. When the legacies shall have been fully paid and only one annuitant is living there probably will be a surplus annual income of both the real and personal estate. That is to be paid at once before the arrival of the time when on the death of the last annuitant and when all the legacies shall have been paid the real estates are to be conveyed and the corpus of the personalty is to vest. The right to receive the surplus rents and profits of the real estate, and of the interest and dividends of the personalty, if there be any, is vested in Joteendro for life, or until the time arrives for the conveying of the real estates and the vesting of the corpus of the personalty.

I now proceed to determine the first issue, and for that purpose to consider whether according to the facts stated in the plaint, if true, the Plaintiff has any cause of action. The plaint alleges in par. 19 that the Plaintiff has been informed and believes (and the facts are more within the knowledge of the Defendants than that of the Plaintiff) that the Defendants the Executors of the said Prosunno Coomar Tagore or some or one of them have, against the directions contained in the said Will, sold or otherwise disposed of a large amount of Government Securities out of the corpus of the estate of the said Testator, and have improperly applied the proceeds thereof, and that he apprehends that unless the Defendants be restrained by injunction there is danger of the estates being wasted or otherwise dealt with contrary to the directions of the said Testator. The Defendants Woopendro Mohun Tagore, Joteendro Mohun Tagore and Doorga Prosaud Mookerjee in the 6th paragraph of their written statement say : " They have not nor has any of them sold or disposed of any Government Securities contrary to the directions of the Will, nor in any way improperly disposed of any proceeds of any Government Securities. They have sold a portion

of the Government Securities and have applied the proceeds in the payment of the debts of the Testator." But they do not in the last paragraph say that they have not sold any other portion of the Government Securities or applied the proceeds otherwise than in the payment of debts. Their defence rests upon the denial contained in the first portion of the paragraph, which asserts that they have not sold any Government Securities contrary to the directions of the Will nor in any way improperly disposed of any proceeds of any Government Securities. That denial involved a mixed question of law and fact. Upon that the issue settled for trial raised the question whether the Executors have misappropriated any and what portion of the Testator's estate.

It therefore becomes necessary to consider whether, assuming that the Executors and Trustees have misappropriated any part of the Testator's estate, the Plaintiff has any cause of action.

The learned Judge with reference to this portion of the case says: "I am in a position to say that the allegation of waste made by the Plaintiff falls to the ground. The Trustees and Executors are distinctly empowered by the Will to pay debts and legacies out of the personalty, and the selling of the Government papers of which the Plaintiff complains may as far as anything goes which is stated by Plaintiff have been effected for that purpose."

I cannot concur in this view of the case, for if the sale of the Government papers of which the Plaintiff complains was effected under the powers of the Will, merely for the purpose of paying such of the debts and legacies as the Defendants were authorized to pay out of the personalty, it is clear that the Plaintiff's allegation that the Executors have sold and disposed of a large amount of Government papers against the directions of the Will and have improperly applied the proceeds thereof, is not true. That allegation however has been made and has been denied, and an issue has been expressly and directly raised upon it. If the Plaintiff has a right to complain of waste the issue ought to be tried and determined.

The learned Judge, as I have already shown, has held that

if no person designated by the Will as ultimate taker of the inheritance has been born, the Plaintiff as heir-at-law has for the time the immediate expectation of succeeding to the inheritance on the termination of a life in being, and for that reason has a sufficiently substantial present interest to entitle him to ask that the property be protected against waste.

The Plaintiff has in my opinion a right to have the issue tried, for I do not concur with the learned Judge that the allegation of waste made by the Plaintiff falls to the ground. Independently of that finding, that the allegation of waste falls to the ground, the Plaintiff even according to the opinion of the learned Judge upon the other part of the case has a right to have the issue tried.

I find upon the first issue that the plaint does disclose a cause of action.

2ndly.—That the Testator did die intestate as to some portions of his property, that is to say, without any valid devise or bequest thereof.

3rdly.—That part of the immovable property of the Testator was ancestral estate and that he had a right to dispose of it by Will, and that it is therefore unnecessary to determine what particular portions of such property was ancestral.

As to the 4th issue it must be declared that the devises and gifts to Joteendro Mohun for life are valid, so far as they relate to the real property, and that he is entitled during his life and so long as he shall be entitled to the beneficial enjoyment of the said real property or to the rents or surplus rents thereof, and until the legacies and annuities in the Will mentioned shall have fallen in and been fully satisfied, to receive the monthly sum of Rs. 2,500 out of the net rents and profits of the real estates and the unexpended surplus of such rents and profits after the payment of the charges thereon, and also to the surplus of the interest dividends and annual proceeds of the movable estate which shall from time to time remain unexpended after making the payments directed by the said Will to be made out of the same, and it must be declared that it is not necessary to come to any

other finding upon the 4th issue or to make any other declaration of right as to the real property save that above mentioned, and that the gift of the corpus of the personalty is void, and that the beneficial interest in the same is vested in the Plaintiff subject to the charge, therein created by the Will.

5thly.—That the Plaintiff is not entitled to maintenance. The case must be sent back to the Lower Court with a request that that Court will try the 6th* issue and return its finding thereon together with the evidence to this Court. It appears to me that the Trustees (Defendants) are bound to render an account of the rents and profits of the immovable estate and also an account of the movable estate and of the interest dividends and profits of such movable estate and of the mode in which they have applied the same. The Testator by his Will directed that out of the net annual income of the said real property the person or persons for the time being entitled under the limitations and provisions thereafter contained to the beneficial enjoyment of the said real property, or of the income or surplus income thereof, should receive for his own use every year Rs. 2,500 a month, and the various legacies and annuities given by the said Will should only be paid gradually and as might be found possible by his said Trustees or Trustee out of the balance that after such last-mentioned payment should remain of the said annual income of the said real property.

As I understand that portion of the Will, the surplus rents of the real property after paying Rs. 2,500 a month are to be applied to the payment of the legacies and annuities given by the Will.

The Testator also desired the Trustees after making certain payments to hold the personalty upon trust to sell and convert into money such portion thereof as should remain unexpended and as should not consist of money or securities for money, in trust to invest the same or to permit the same to remain invested, and out of the interest and dividends and annual proceeds thereof in trust to pay the said annuities and any of the

* This is a mistake, it should be the 7th issue.

said legacies which should become payable after the trust monies should have been invested so far as the said interest &c. should suffice for these purposes, and after payment of such annuities and legacies to pay the surplus unexpended of the said interest dividends and annual proceeds unto the person or persons who for the time being should under the limitations and directions thereafter contained and expressed, be entitled to the beneficial enjoyment of the real property or of the rents and profits or surplus rents and profits thereof.

The Plaintiff, being entitled to the corpus of the personal estate as soon as the legacies and annuities shall have been paid off, is interested in seeing that the funds which by the Will were made applicable for the payment of such legacies and annuities are duly and properly applied, and in order to ascertain whether they are so applied, or not he is entitled to have an account of the monies and securities which have come into the hands of the Trustees and to see how they have been applied. I find it laid down in Lewin on Trusts, p. 329, that "Trustees for the sale and payment of debts (and I apprehend that the same rule applies to trustees for the payment of legacies and annuities) are of course at any time to answer inquiries by the author of the trust, or the person claiming under him, as to what estates have been sold and what debts have been paid."

The Plaintiff claims under the author of the trusts. He claims by inheritance the corpus of the estate which had not been legally bequeathed by the Will of the Testator.

At p. 491 of the same volume it is stated that "as an incident to the beneficial enjoyment by the *cestui que* trust of his interest, he has a right to call upon the Trustee for accurate information as to the state of the trust. Thus in a trust for sale and payment of debts the party entitled subject to the trust may say to the Trustee 'What estates have you sold? What is the amount of the monies raised? What debts have been paid?' It is therefore the duty of the Trustee to keep clear and distinct accounts of the property he administers, and he exposes himself to great risks by the omission. It is the first duty, observed Sir T. Plumer, of an accounting party whether an agent a trustee a receiver or an executor (for in

this respect they all stand in the same situation) to be *constantly ready with his accounts.*"

In Williams on Executors, p. 1852 it is said that a "Court of Equity will compel an executor or administrator in the same manner as it does an express trustee to discover and set forth an account of the assets and of his application of them."

It seems clear then that a Trustee is an accounting party and bound to render accounts.

In Brookes and Oliver (Ambler's Report, p. 406) the Plaintiff being entitled to a large real estate in Antigua and to a personal estate there and in England under the Will of Jonas Longford, brought his Bill against the Defendant Oliver and others for an account, and it was prayed that Oliver, who was the only acting Executor and Trustee in England and to whom the produce of the estate in Antigua was remitted by the directions of the Testator, might account annually by affidavit instead of the usual way, which it was said would be a great saving to the infant's estate and a precedent of such a decree was produced in the case of Blair v. Drake, 11th February, 1755-where Lord Hardwicke directed that the Defendants Drake and Long should account for the estate and effects of the Plaintiff Blair, an infant, and as often as any sum or sums belonging to the Plaintiff, the infant, should come to their hands by consignment of effects or remittance of money, it was further ordered that the same should be ascertained by the affidavit of the said Defendants and that after all just allowances deducted thereout the Defendants should pay the clear surplus of what should so come to their hands by consignment or remittance into the Bank with the privity of the Accountant-General, &c.

In that case the order was made for the Defendant to account annually by affidavit to the infant.

It appears to me therefore that the Plaintiff in this case is entitled to an account from the Defendants of the whole of the funds which are applicable to the discharge of the legacies and annuities, and also to know from them how they have applied those funds.

Suppose in this case that the annuities and legacies were very small, and that the rents of the real estate and the interest of the personal estate were much more than sufficient by the present time to have paid off the whole of the annuities and legacies; surely the Plaintiff who is entitled to have the corpus of the personal property made over to him for his absolute use as soon as the legacies and annuities are fully discharged, is entitled to have the trust monies properly applied to the discharge of the legacies and annuities and to have an account of what has been received and how the same has been applied. There must therefore be a decree for an account.

The costs in the Lower Court are to be paid out of the surplus rents and profits of the immovable estate after payment of the monthly sum of Rupees 2,500.

The legatees and annuitants are not parties to this suit, and consequently the costs ought not to come out of the interest of the movable estate or of the dividends and interests thereof, which form the first fund applicable to the payment of the debts, legacies, and annuities, and further the principal contention in this case has been with reference to the immovable estate. The Plaintiff's costs of this appeal will also be paid out of the said surplus rents and profits of the immovable estate. The costs of the Defendants of this appeal are reserved until after determination of the 7th issue.

MR. JUSTICE NORMAN :—This is an appeal from the decision of Mr. Justice Phear dismissing the Plaintiff's suit.

The Plaintiff is the heir, according to Hindoo law, of his father the late Prosono Coomar Tagore Rai Bahadoor, formerly a member of the Legislative Council of the Governor-General of India. It was admitted before us that Prosono Coomar Tagore was a Hindoo of Bengal and that the case must be governed by the Hindoo law as current in Bengal.

The Defendants are the Executors under the Will of Prosono Coomar Tagore and certain devisees under the Will.

The Plaintiff asks amongst other things for an injunction,

and for other relief, on the ground that the Executors are committing waste by selling Government paper contrary to the directions of the Will.

The Court laid down an issue whether the Executors have misappropriated any and what part of the Testator's estate.

The learned Judge says: "I am in a position to say that the allegation of waste made by the Plaintiff falls to the ground. The Trustees and Executors are distinctly empowered by the Will to pay debts and legacies out of the personalty, and the selling of Government papers of which the Plaintiff complains may, as far as anything goes which has been stated by the Plaintiff, have been effected for that purpose."

In that observation I cannot concur. No doubt the statement that the Executors are committing waste by selling Government paper contrary to the directions of the Will is very loose. Possibly the Defendants might have objected to answer on the ground that the allegation was too vague, but it must be remembered that a Plaintiff who under Act VIII. is obliged to verify his plaint is in a very different position from that of a party filing a Bill on the Equity side of the late Supreme Court in charging waste or other wrongs done or supposed to be done by Trustees or other persons of whose transactions he has no means of obtaining exact information. The Defendants have not only answered the charge made against them but accepted an issue raised upon the question whether they have misappropriated any part of the Testator's estate. It seems to me too late after that to say that the issue cannot or shall not be tried.

The next question is whether the Plaintiff has such an interest in the property dealt with by the Will as to give him any right to raise that question. According to the practice of Courts of Equity if there be any person who, under the Will, takes a vested estate of inheritance interposed between that of the Executors and such ultimate reversionary or expectant interest as may remain in the Plaintiff as heir according to the Hindoo law the Plaintiff would be considered as having no such present interest as would entitle him to ask aid of the

Court to call on the Executors to account, and we should only have to pronounce that the Plaintiff is not entitled to obtain immediate relief of any kind from this Court and therefore the suit ought to be dismissed.

The surplus income of the monies and securities for money forming part of the Testator's estate after payment of annuities and legacies, is given by the Will to the person or persons for the time being under the limitations of the Will entitled to the beneficial enjoyment of the real property, or the rents thereof, and as soon as the annuities and legacies are paid the Trustees are to stand possessed of the said trust monies in trust absolutely for the person or persons entitled under the limitations and directions in the Will expressed, to the beneficial and absolute enjoyment of the real property. I proceed to examine the limitations of the real property contained in this Will.

The Testator states that the frequent division and subdivision of estates in Bengal is injurious alike to the families of zemindars and to the ryots who are oppressed by numerous and needy landholders having conflicting interests, that he has bestowed much time on the improvement of his estate and the condition of the ryots and tenants thereof, and that he is desirous that such improvement should go on, and should not be interrupted by any division of the said estate or disputes concerning the same, and then proceeds, after first giving the landed property to Joteendro Mohun Tagore for his life in the events that have happened, to limit his estates to the sons successively of Joteendro Mohun Tagore born after the Testator's death and what he calls their heirs. Not their heirs according to Hindoo law, or any other known law of inheritance, but according to a system of primogeniture devised by the Testator excluding females on which he has attempted to engraft the Hindoo law of adoption. He says: "I declare in the construction of this my Will that the elder line shall always be preferred to the younger and that every elder son of each heir in succession by descent, and failing descent by adoption, and his issue or heirs male by descent, and failing descent by adoption,

shall be preferred to any younger son and his issue or heir male by descent or adoption."

He then provides for the exclusion of females and their descendants, and for the exclusion of all rights or claims of provision or maintenance of any person, male or female, out of the estate.

He provides that "any and every son adopted according to Hindoo law shall in respect of all the devised limitations and provisions in this my Will contained, and may be deemed and taken to be a younger son of the body of his adoptive father within the meaning of this my Will and shall be capable of taking as a son and heir male of the body of his adoptive father. Provided always that a son or sons duly adopted by a widow after her husband's death, under and according to directions from such husband to her to adopt a son or sons, shall whether such sons be the first son adopted by such widow in pursuance of directions from her deceased husband, or whether he be a son subsequently adopted by her in pursuance of such directions but after the death of a first or other son adopted by her, be in all respects for the purposes of this Will taken as an adopted son of such husband and shall be taken under this my Will exactly as if he had been adopted by such husband in his lifetime."

Now if this provision giving estates to sons to be adopted by widows could have any effect, as the widow is to be excluded from inheritance, the consequence would be that on the death of any person who might have become entitled under the limitations in the Will dying leaving a widow with power to adopt, the estate must remain in abeyance for an indefinite time without an owner until the widow shall either adopt or die without adoption.

After the failure or determination of the limitations to the sons of Joteendro Mohun and their descendants, the Testator proceeds to limit over the estate to Shourendro Mohun Tagore and his descendants successively, Lullit Mohun Tagore and his descendants, Woopendro Mohun Tagore and his descendants, and Brijendro Mohun Tagore and his descendants, in

each case subject to the provisions declared respecting the sons of Joteendro Mohun and the heirs male of their body, as if the same had been repeated in each case. Then he declares his will and intention to be to settle and dispose of his estate in manner aforesaid as fully and completely as a Hindoo resident in Bengal may give or control the inheritance of his estate, or as a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him and not subject to any law or custom of England by which entails may be barred, affected, or destroyed.

He adds, "I hereby declare that if any devisee or tenant
 " for life, or in tail, or otherwise, or any person entitled to
 " take as heir by descent or adoption or otherwise or in any
 " manner under the limitations hereinbefore contained shall
 " permit the said property so devised and limited as aforesaid
 " or any portion thereof to be sold for arrears of Government
 " Revenue or shall after attaining his majority cease to keep
 " up in a due state of repair and to use as his residence in Cal-
 " cutta the said Boituckhana house and premises where I now
 " reside, and make use and enjoy my library, horses, carriages,
 " furnitures in the said house and jewels and gold and silver
 " plates &c. in my use or possession, then, and immediately
 " thereupon, the devise and limitations in this my Will con-
 " tained and declared shall wholly cease and determine as to
 " him; and the person next in succession to him, under the
 " limitations aforesaid, shall at once succeed as if the said person
 " so permitting or suffering the said property or any portion
 " thereof to be sold for arrears of Government Revenue, or so
 " ceasing to keep up in a due state of repairs and to use as his
 " residence my said Boituckhana house, had then died, and I
 " empower and authorize any person (after my said estate shall
 " cease to be vested in my said Trustees or Trustee) for the
 " time being entitled in possession to my said real estate under
 " the limitations in this my Will contained to manage and
 " improve the same at their discretion, and to grant leases or
 " pottahs thereof or of any parts thereof for any term of years
 " not exceeding 20 years in possession from the date of making

“such lease or pottah, and so as the net rent to be reserved, and no fine premium or salamee be given or taken, and so as the lease or pottah contain a proviso or condition for re-entry on non-payment of the rent for a period not exceeding 3 years after the same shall become due or on breach of any of the covenants or terms to be contained in such lease or pottah.” When the scheme of the Will now before us is carefully considered, it becomes at once apparent that it is utterly repugnant to Hindoo law. It is an attempt to exempt the Testator’s family and property from the operation of that law, and subject that family and that property to special laws and rules of inheritance for a time which is absolutely indefinite, which, looking at the powers of adoption, may be conceived as capable of lasting as long as the Hindoo law itself. If the limitations beyond the gift of life interests to persons living at the death of the Testator, or possibly a life interest to the first son of Joteendro Mohun born of his loins or adopted in his life time (the question as to which first life interest stands, as we shall see, on a footing somewhat different from the rest) are good for anything at all, they are apparently good for that.

Before discussing in detail the provisions of the Will it seems convenient to consider the nature and extent of testamentary disposition as it must exist in communities when such power has not been extended by legislative enactments. In all civilized communities we find laws of inheritance regulating the transmission of property by descent or inheritance. If those laws are to be altered, if the rules of succession and course of descent as affecting any particular lands or any other property are to be permanently changed, it must be by the act or with the sanction of the Legislature, the Supreme and Sovereign authority in the State. It is evident that no citizen of the State can by any act of his own withdraw any portion of property from the operation of the laws of the State. And it is equally clear that no such person can either by gift or Will subject his property to special rules of descent conditions or other incidents unknown to or which are at variance with

those laws. It seems needless to cite authorities to support so clear a proposition. But if authority is needed I may mention that in the Prince's case (8 Coke's Reports, p. 14) it was determined that a course of inheritance against the rules of the common law of England could not be created except by Act of Parliament.

So a condition attempted to be engrafted upon an estate in fee that daughters shall not inherit, has been held void because it is repugnant to the estate and an attempt to establish a different kind of inheritance from that which is allowed by law. I will add an illustration from the case of an estate tail. In Sir Anthony Mildmay's case (6 Coke's Reports, p. 40) it was determined that there are several incidents to an estate tail. "First. That the tenant in tail shall be dispunishable for waste. 2nd. That his wife shall be endowed. 3rd. That the husband of a woman tenant in tail after issue shall be tenant by the courtesy. 4th. That tenant in tail may suffer a common recovery and thereby bar the estate tail and the reversion or remainder also, and these inseparable incidents which the law annexes to an estate tail cannot be prohibited by condition. And therefore if a man makes a gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the courtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law."

Now if a Hindoo can by deed or Will create an estate tail he can subject his estate to a rule of inheritance unknown to the Hindoo law.

The Testator apparently imagined that he could create an estate tail. He expresses a desire to do so. He calls the estate an entail and has employed technical language which at first sight may appear to be appropriate for that purpose. For instance, he gives "To the use of each of the sons of the said Joteendro Mohun Tagore who shall be born after my death successively according to their respective seniorities and the heirs male of their respective bodies issuing so that the elder

“of such sons and the heirs male of his body may be preferred
 “to and taken before the younger of such sons and the heirs
 “male of their and his respective bodies issuing.”

These words would be appropriate to the creation of an estate tail if a Hindoo can create such an estate. I propose then to see what an English estate tail is, in order to determine the question whether such an estate can be created by a Hindoo either by deed or Will.

The English common law originally recognized three species of estates—estates in fee, estates for life, and estates for years. Estates in fee might be either absolute or conditional or qualified. Prior to the passing of the Statute of Westminster the Second in the 13th year of the reign of King Edward the First, if lands had been given to a man and the heirs of his body issuing the donee took a fee simple conditional. If before the birth of issue he sold or made what was called a feoffment in fee, the donor could not have entered for the forfeiture, and the sale or feoffment *barred* the issue of the donee born afterwards.

After issue born the donee might have alienated in fee, and thereby have barred the donor and his heirs from all possibility of reverter.

The statute in question made new provisions concerning lands given upon condition. It declares that where one gives his land to a man and his wife and to the heirs begotten of their bodies with a condition expressed that if the man and his wife die without heirs of their bodies begotten the land as given shall revert to the giver or his heirs, or where one gives land to another and the heirs of his body issuing it seems very hard to the givers and their heirs that their will being expressed in the gift should not be observed.

It recites that in such cases donees have power to alienate the land so given and to disinherit their issue of the land contrary to the minds of the givers and contrary to the form expressed in the gift. And that when the issue of such donees fail, the land ought to return to the giver or his heir by form of the gift, yet by the deed and feoffment of them (to whom land

was so given upon condition) the donees had theretofore been barred of their reversion which was directly repugnant to the form of the gift. Therefore, to provide a remedy in such cases, it was ordained that the *Will of the giver according to the form in the deed of gift manifestly expressed should be from thenceforth observed, so that they to whom the land should be given under such condition should have no power to alienate the land so given, but that it should remain to the issue of them to whom it was given after their death, or should revert unto the giver or his heirs if issue fail.*

The English estate tail was created by this enactment, which is commonly called the Statute *De Donis*.

The enactment, just and reasonable as it may appear at first sight, was productive of anything but unmixed good. In Sir Anthony Mildmay's case cited it was said "At Common Law" all inheritances were in fee simple, and the reason thereof was that neither lords should be defeated of their escheats nor farmers or purchasers lose their estates or cases or be *evicted* by the heirs of the grantors or lessors nor such infinite occasion of troubles contentions and suits arise. But the true policy and rule of the common law on this point was in effect overthrown by the Statute *De Donis*, which established a general perpetuity by Act of Parliament for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the cause of great mischief. And it was attempted to remedy the same in different Parliaments, and various Bills were exhibited but they were always on one pretence or other rejected. The truth was that the Lords and Commons, knowing that those estates were not to be forfeited for felony or treason as their estates were before the said Act (and chiefly in the time of Henry the Third in the Barons' War), and finding that they were not answerable for the debts or incumbrances of their ancestors, and that the sales, alienations, or leases of their ancestors did not bind them for the lands which were entailed to the successors, always rejected such Bills. And the same continued till about the 12th year of the reign of King Edward the Fourth, when the Judges in consultation

amongst themselves resolved that an estate tail might be docked and barred by a common recovery.

It is needless to state that the Statute *De Donis* does not apply to the Wills of the Hindoos, and Hindoos have never been empowered by any legislative enactment to transmit their estates to their descendants *fettered* with conditions unknown to Hindoo law. The conclusion which I draw is that a Hindoo has not the power to create an estate tail.

I think it plain that courts of justice in this country would not be warranted, on any supposed principles of natural justice, public expediency, or convenience, in giving effect to a disposition by which a Hindoo should attempt to create such an estate. No man can by Will create a new rule of inheritance to regulate the descent of his property. But wherever, during life, an owner of property can dispose of it at his own free will and pleasure it would seem true on principle, and I believe that notwithstanding a great deal that has been said to the contrary, it is generally true in fact, that in communities where the power of disposition has not been restricted by positive law or artificial rules each owner can make *a gift of the same to take effect on his death*. In considering the extent to which a person may bind his property by Will or gift, it must be remembered that from the instant of death all further dominion on the part of the former owner ceases to exist. The property at once passes into new hands. The new owner may be the heir to whom the succession falls or the legatees, or if part is given by Will the legatees may take such part, but in such case the residue must descend to the heirs of the former owner. The whole inheritance must at once vest in some person either absolutely or, where the law allows of such a limitation, as a Trustee, such as a Trustee to preserve contingent remainders, or the like. No part can remain in abeyance, or without an owner, till the happening of a future event. We have therefore to consider what is a Hindoo Will. To the extent of such gift as a Hindoo can make by Will, and no further, he can interfere with the course of descent.

The question, as to the power of a Hindoo to dispose of property by Will, and the extent to which by such Will he can

disinherit his heirs, are distinct and must be considered separately. Hindoo law contains no separate head on the subject of Will or Testament. But I will endeavour to show that the power of making gifts to take effect on the death of the donor, in other words gift by Will, is not of modern introduction or foreign origin but is distinctly recognized by Hindoo law. From the time of the establishment of the Mayor's Courts in Calcutta and Madras probates of Wills of Hindoos were granted by those Courts. To this I may add, on the authority of a statement of the Procureur-General cited in an essay by Mr. Montriou on the Hindoo Will, that at Pondichery the Wills of Hindoos were recognized in the French settlements from the commencement of the French rule. Between 1789 and 1792 the Pundits of Calcutta, Nuddea, Benares, Gyah, Dinajpore, Moorshedabad, and Dacca were consulted as to the effect of the Will of the Nuddea Rajah. Amongst these were Jugurnatha Turka Panchanana, the author of the Digest. The Pundits differed as to the effect of the Will, but it does not seem that one of them doubted the right of a man under Hindoo law to dispose of property by Will. (See Montriou's cases on Hindoo Law, Appendix, Note XVI.) In 2 Strange's Hindoo Law, pp. 417 to 427, the opinion of the Pundits of Billary, Madras, Mussullipatam, Chittore, Chingliput, and Vizagapatam are given each upon a different case. In every one of these opinions the power of a Hindoo to make a Will is either asserted or assumed. Wills are also found in the records of the Zillah Courts at Bombay, as appears from numerous cases in Borradaile's Reports of the Wills litigated in the late Supreme Court. The earliest in point of date is that of Omichand, a Seikh. Then comes that of Gunga Bissen, a Khettry, apparently a native of a province in which the rule of the Mitacshera prevails. Sir William Jones is said by Sir Thomas Strange to have observed that the Hindoo law knows no such instrument as a Will. I do not know to what passage in Sir William Jones's works the author refers, but we find that learned Oriental scholar and eminent lawyer in the case of Munnoo Lall Baboo v. Gopee Dutt (Montriou's Reports, p. 295) upholding a particular Will as valid according to what seemed

to be the opinion of the Pundits citing Sanscrit books and particularly a passage from one of the Hindoo writers, according to Mr. Justice Hyde, "whom the Pundits acknowledged to be the highest authority." Mr. Henry Colebrooke, in a note to the Digest, had said that "Hindoo law knows no such instrument as a Will." We shall see that he recanted that opinion at a late period.

It seems plain that at least the Hindoo Will was not of local origin, but that Wills were known to and in use amongst Hindoos not in the Presidency Towns only but from one end of the Peninsula to the other. I think it is a just inference that the right to make a Will does not arise from any more modern practice or approved usage, but springs from a source to which all Hindoos have access, in short that it is part of Hindoo law itself.

The whole scheme of inheritance, as found in Hindoo law, depends on and has reference not to any notion of a right existing in the persons designated as heirs arising from nearness of kin, the claims of natural affection, or any theory of representation, but almost solely on the spiritual benefits to be conferred on the ancestor by the person on whom the property is to devolve. The notion of gift implied in the term for heritage (*Dayabhaga*) is a favourite theme for the speculations of commentators on Hindoo law. It seems to show that the title of the Hindoo heir is not treated as one arising out of the inherent right in persons standing in a particular relation to the deceased to take as the next or natural occupant of property abandoned at his decease, but upon some original theory of a gift, relinquishment, or surrender by the dead man to the heir. When such is the case the transition seems quite easy to the idea expressed at p. 9, Vol. III. of Colebrooke's translation of Digest, that no right is vested in the son if it is resisted by the father's declared Will. "This shall belong to the priest." I ought to add that the passage I refer to relates to a gift completed by delivery during life; but it seems equally applicable whether delivery took place in life or not.

There are several passages in the older writers which lead

to the inference that gift by Will is included when they are speaking of gifts in general terms, and of what can, and what cannot be given. In the Smriti Sara it is said the gift of a man's whole estate is valid for it is made by the owner, but the donor commits a moral offence because he observes not the prohibition.

Now such a gift would hardly be made otherwise than to take effect on the death of the donor, or in contemplation of his becoming an anchorite.

Vrihaspati and Menu say in general terms, at his pleasure, a man may give what he has himself acquired.

Nareda says, the father advanced in years may himself divide the estate among his sons giving to the first-born the best portion, or in any mode which he shall choose. In Colebrooke's Digest, book 5, c. 4, s. 1, p. 3, is a passage from Catyayana as follows :—

“What a man has promised in health or in sickness for a religious purpose must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it.”

Jimuta Vahana in the Daya Bhaga points out that gift is the cause of ownership. It would follow that in his opinion a gift by Will, though the donee did not accept in the lifetime of the donor, would vest the property in the thing given in the donee so as to entitle him to accept and appropriate it at his pleasure after the death of the donee without needing the assent of the heirs. There is a plain allusion to a Will in the Digest of Jagannatha Turkapunchanau, book 5, c. 1, s. 1, art. 1, p. 2, note. It is said to be in accordance with the opinion of Vachusputi Bhattacharjee (author of the Divaita-nirnaya). If a “father at the point of death, or becoming an anchorite, declare so much wealth is left by me, let it belong to my sons, it may, in that case, be said he died or became an anchorite after giving or bequeathing all his property to his sons.”

In the Vol. II. of the Digest, p. 284, it is said: “In the case of a gift in this or other form, this field belonging to me shall be thine after my death, the act of volition

which constitutes gift is passed at that very time. The property of the giver is not divested nor is it vested in the donee until after the giver's demise. It is added authors admit the gift of a future thing."

Now if I am right in thinking that a law of Will is part of the Hindoo law and not a mere usage which has grown up in modern times borrowed from Western civilization, the extent and nature of the disposition which a Hindoo Testator is capable of making is not a question to be determined upon any notion of public expediency as supplied by Mr. Justice Phear, or of custom or usage as suggested by Mr. Justice Markby in a late case, but depends on the nature of the power which the Testator is exercising, and must be regulated by rules to be found in or directly deduced from Hindoo law. Mr. Justice Phear says a Will has been well termed a Testamentary Trust. I do not know to what he refers or whether the expression has ever been applied to a Hindoo Will. An English Will has been said to operate as a declaration of uses, but I think that expression would be wholly inapplicable to a Hindoo Will.

The truth is that the Roman Testament by which the *hereditas* the entire political and social rights of the Testator were transferred to the person appointed to be heir, with a Testament or Writing containing directions to the heir or the *familiæ emptor* as to how the property should be disposed of after the death of the Testator. The English Will of personalty appointing an Executor and containing the Testator's will as to what he would have done with the property after his death, under which a legatee does not take his legacy without the assent of the Executor, the English devise of land which is considered not in the nature of a Testament but as a consequence by way of appointment to a particular devisee, and the Hindoo Will, though all passing under the common name of Will, were in their origin and are in their nature distinct things. I think that there is no ground whatever for saying that a Hindoo Will can operate as a declaration of uses.

"In May, 1812, Mr. Henry Colebrooke, then a Judge of the late Sudder Court, in answer to a question by Sir Thomas

Strange, "Whether a Hindoo can dispose of his property by Will," writes as follows:—

"After much consideration of the question when agitated here some years ago it was settled that a Will must be held valid in the case of a Hindoo, being in fact a gift made in contemplation of death, which the Hindoo law if it does not directly sanction contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time determinable by a certain event (the decease of the giver) I apprehended it must be governed and controlled by the general rules regarding gifts." (See 2 Strange's Hindoo Law, p. 431.) Again, in a further note at p. 435, he says: "A man cannot confer on a stranger or his own heir by Will what he could not bestow by deed of gift."

Now in order to make a gift valid in Hindoo law it would appear that there must be a person capable of accepting the donation. In the *Daya Bhaga*, c. 1, s. 21, it is said, in case of donation the donee's right to the thing arises from the act of the giver, namely from his relinquishment in favour of the donee who is a sentient person. (See also *Shama Churn's Vyavastha*, p. 600.) In a passage there cited from *Srikrishnah's Commentary upon the Daya Bhaga* it is said a donor makes a gift to an absent person with an assurance that the donation will be accepted by him; the donee's right accrues, but if it be known that the gift would not be accepted by donee the donor's right is not extinguished. In such case the gift is said to be void. As the ownership of the donor has expired by his death. The thing which has been given by such void gift becomes at once part of the heritage of the deceased and partible amongst his heirs. To use the words of the commentator *Jagannatha Turkapunchanana* (*Colebrooke's Digest*, book 5, c. 1, s. 1, p. 11, note), the vesting of the right in the sons is no longer resisted by the father's declared Will. The property in that which is not given vests at once in the heir of the Testator.

On that principle, according to Hindoo law a gift to a person not in existence at the time of gift would fail.

If such is the rule of Hindoo law it is not one which is

exceptional or anomalous. It would be in fact strictly analogous to the ancient rule of Roman law before the introduction of the *fidei commissa*, and that of English law before the introduction of trusts.

By the ancient Roman law a child after the death of the Testator was incapable of taking as heir or legatee under a Testament. He had not at the time of the Testator's gift any certain existence, and the law said *incerta persona institui non potest*. In course of time the law permitted the posthumous child, if a child of the Testator or of his descendants in the male line, to become an heir, but the civil law never permitted the child of a stranger, born after the Testator's death, to be a legatee.

It is a rule in English law that a devise ought to be good and take effect at the time of the death of the devisor, and therefore it was ruled that if a man seised of land devised the same to the priests of a college or chantry, and there was not any such college or chantry at the time of the death of devisor, and afterwards such a college or chantry was made, the devise was void. The reason is stated as follows :—

The devisees are purchasers, and when a man takes lands or tenants by purchase he ought to be of ability to take the same when it falls to him by the purchase, or otherwise he shall not have the same ; so a devise in remainder to a corporation where there was none such has been held void though the corporation was created before the remainder fell.

It was early recognized a principle of English law, that a devise may be made to all such persons to whom a grant can be made. By the conjoint operation of the Statute of Westminster and by introduction of the system of trusts by which the beneficial interest was dealt with as a thing distinct from the legal estate, the power of an English Testator to limit estates in future was greatly increased. In *Scattergood v. Edge*, in the 11th year of the reign of King William the Third (12 Mod. Reports, 286), we find Treby Chief Justice saying : “ Ancient books generally ran, a devise to a son in the womb of his mother is void, but I think we must allow such a devise to be good now, for otherwise many Wills would be destroyed

which would be inconvenient, and surely there is no difference between saying I give my land 'to the child my wife goes with' and 'to the child my wife shall have.'" He adds, "executory devises are utterly unknown to the common law." Mr. Justice Phear treats the question whether an unborn person can take under the Will of a Hindoo as disposed of by the judgment of the Privy Council in the case of *Soorjeemony Dassee v. Denobundoo Mullick* (9 Moore's Indian Appeals, p. 135). The question there was not as to the effect of gift to a person not in existence. The Testator had devised his estate to his sons with a proviso which was construed to mean that if either of such sons died without leaving a son or son's son living at his death neither his widow nor daughter should get his share but the same should go over to the other sons. This was exactly what would have happened if the family had been a joint Hindoo family governed by the Mitacschera. Their Lordships held the gifts over to be valid. They treat the question as being whether there is anything against public convenience, anything generally mischievous, or anything against the general principle of Hindoo law, in allowing a Testator to give property whether by way of remainder or executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships thought there was not, and that there would be a great general inconvenience and public mischief in denying such a power, and that it was their duty to advise Her Majesty that such power does exist.

Now so far as regards limitations to persons in existence at the date from which the Will speaks, and so capable of taking a vested interest to take effect in possession, on the happening of some future event, that is no doubt true; but whether a Hindoo could by Will make a devise of his property to an unborn person was not the question before their Lordships, and for myself I cannot assume that they meant to decide it. We have not been referred to a single case in which a devise by a Hindoo to an unborn person has been held good.

I am disposed to think that there is not much reason why courts of justice should endeavour by construction to extend

the power of disinheriting heirs by Will already possessed by Hindoos in Bengal. In England the law of primogeniture exists. The testamentary power is of the greatest importance to enable a father to make proper provision for his younger children: Amongst Hindoos the sons inherit equally, and wives and daughters have a right of maintenance out of the estate of a deceased man. As Mr. Ingram very fairly said, the rule amongst Hindoos is not testacy but intestacy. The Will of a father disinheriting his children is looked upon as a sin though operative on the principle of *factum valet*. Now if, in order to constitute a valid gift by Will according to Hindoo law, there must be a person from which the Will speaks, it will follow that no gift to an unborn person can take effect.

But suppose a Trustee is interposed and the gift is to a Trustee who would be born capable of accepting in trust for a person to be a person within a life in being; suppose, for instance, a man having a son blind, insane, of weak intellect, or hopelessly extravagant in his habits, were to give his property to a Trustee, upon trust to provide for the maintenance of his son and his family during the life of that son, and after the decease of that son in trust for the child or children of such son; suppose the son at that date of the Will had no children; would the limitations in favour of the children to be afterwards born be valid according to Hindoo law? I am not at present prepared to say that it would not. It is not necessary to decide that question, for it does not arise in the present case. If we are now to decide that a Hindoo can make a gift by Will to an unborn person, we should undoubtedly be extending the Testamentary power of Hindoos by judicial construction.

It would be inconvenient to do this to the extent of allowing Hindoos a power of disposition by Will, and a right of restricting the enjoyment of those to whom they may bequeath their estates, which is not permitted to any persons to whose Will the Indian Succession Act would apply.

In the present case the limitations to unborn children purport to confer on them no more than life interests.

By Section 100 of the Indian Succession Act it is en-

acted that where a bequest is made to a person not in existence at the time of the Testator's death subject to a prior bequest contained in the Will, the latter bequest shall be void unless it comprises the whole of the remaining interest of the Testator in the thing bequeathed.

It seems to me that the enactment proceeds on sound and intelligible principles. It is not necessary that we should determine that the gifts to the unborn children are wholly invalid, because, as I shall presently show, the gifts are at most gifts of life interests, and therefore even if unborn sons can take at all, it will not affect the Plaintiff's right to maintain this suit.

Mr. Justice Phear says a devise of property to the use of a person and the heirs male of his body issuing appears to him to be fairly and reasonably interchangeable with and equivalent to a gift to a person, his son, and his son's son. But it seems plain that in the present case there is no devise to any person and the heirs of his body.

The clause immediately following the words referred to by Mr. Justice Phear and the interpretation clause, read together, show that the gift is not to the sons of Joteendro Mohun and the heirs of their bodies, which words would mean in their natural sense their sons taking as heirs according to Hindoo law. The words heirs male of his body are used in an artificial sense, for the purpose of indicating persons who are not the heirs but persons selected by the Testator from among the heirs who are to take in succession by special limitation or special substitution, or, if any one prefers that term, each in his turn as a purchaser. Persons taking under such special substitution do not take estates of inheritance.

The intention is plainly to give to each in succession no more than an estate for his own life. They are to have no power of disposition.

If the Testator has given a succession of estates for life we cannot construe the gift as a gift of the inheritance, because it cannot take effect as the Testator intended. We certainly should not be carrying out the intention of the Testator as expressed in his Will if we treated the first unborn son of

Joteendro Mohun who should come into existence as intended by the Testator to take an estate of inheritance. We should be treating every subsequent limitation as having been intended by the Testator to be merely nugatory, or at least as entirely subordinate to the object of giving the property to the first son of Joteendro Mohun Tagore on conditions which would enable him at once to defeat the whole of the objects which the Testator declared that he had in view in limiting the estate as he has done. In a somewhat similar case (*Seaward v. Willock*, 5 East, p. 198) Lord Ellenborough said the meaning of the Testator clearly was to give estates for life only to his grandson, and after him to his sons, and after them to their sons down to the tenth generation. But this he could not do by law inasmuch as the law will not allow a succession of limitations for life to persons unborn. He says: "Can we then make another Will for the Testator giving the devisees different estates from those he meant to give to them because the estates he intended cannot by the rule of law take effect? This I conceive would be assuming a power which does not belong to us."

I do not propose to consider the position of Shourendro Mohun Tagore his son Promothe Coomar Tagore and Surrut Chunder Tagore the son of Judoo Nundon the son of Lullit Mohun Tagore. These persons were all in existence at the time of the death of the Testator. It is sufficient to say that the utmost to which in any event any one of them can be entitled is a life interest in the property. It may be that the devises to these persons will fail as being given to them in succession after limitations to persons who by no possibility could take under the gifts to them. First, because we cannot assume that the Testator would have given anything to the subsequent devisee if he had known that his prior gift could not take effect; and secondly, because if gifts over in such cases were held to be valid it might in many instances wholly defeat the Testator's intention. But the case of *Evers v. Challis* (7 House of Lords, p. 531) creates a doubt in my mind whether the prior limitation may not be treated as divisible. Whether if

Joteendro Mohun dies without ever having had any children and without leaving a widow with power to adopt, Shourendro Mohun might not, as suggested by Mr. Phillips, take an estate for life by way of remainder on the happening of those events. According to the case of *Lady Langdale v. Briggs* (8 De Gen Macnaughten and Gordon, p. 391) we cannot under the 15th Section of Act VIII. now make a binding declaration as to what may be the rights of Shourendro and the others in events which have not happened, and therefore I abstain from pronouncing a decided opinion on the subject.

As soon as the legacies and annuities are satisfied, there is a trust to convey the real estate unto and to the use of the person who shall under the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate as far as the then conditions and circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance of settlement without infringing upon or violating any law against perpetuities which may then be in force and apply to the said real estate on the conveyance or settlement of it as last aforesaid (if any such law there shall be). It appears to me that this clause cannot in any way improve the position of the devisees under this Will. In the first place a Testator cannot by directing Trustees to execute a conveyance at a future time extend his own testamentary powers, or enable himself through the intervention of such Trustees to make a disposition which he could not have made himself at the date of his Will. (See the *Duke of Marlborough v. Lord Godolphin*, 1 Eden, p. 404.) Secondly, when the power given by the Will with reference to this object is carefully considered, it does not appear to authorize the revocation of, or in fact any interference with, the existing limitations in the Will further than as they may be affected by any future law against perpetuities not in force at the date of the Will, the Testator evidently considered that he had provided for all existing difficulties of that kind.

I now come to the clause relating to the personal estate which the Plaintiff alleges the Executors to have misapplied. The material parts of it are as follows:—

“ I give devise and bequeath all my property both real and
 “ personal of what nature or kind soever unto and to the use of
 “ Roma Nath Tagore, Woopendro Mohun Tagore, Joteendro
 “ Mohun Tagore and Doorga Persaud Mookerjea their heirs
 “ according to the nature and tenure of the said property to hold
 “ the same upon the trusts hereinafter declared concerning the
 “ same that is to say as to personalty. In Trust to collect and
 “ get in the same (save and except certain jewels household
 “ furniture &c.) and thereout to pay my funeral expenses and
 “ debts and such legacies as may be payable in the ordinary
 “ course of administration within one year from the time of my
 “ death and after paying the said funeral expenses debts and
 “ legacies upon trust to sell and convert unto money such portion
 “ of my said personal estate as shall remain unexpended and as
 “ shall not consist of money or securities for money and to stand
 “ possessed of the proceeds of such sale and conversion and
 “ of all monies and securities for money then forming part
 “ of my estate. In Trust to invest the same on such securities
 “ as to my said Trustees shall seem fit with power to my said
 “ Trustee from time to time to alter or vary the investments. I
 “ desire that my said Trustees or Trustee do and shall out of the
 “ interest dividends and annual proceeds of the said Trust monies
 “ and securities pay the several annuities given by this my Will
 “ and also any of the legacies which shall become or be payable
 “ after the said Trust monies shall have been invested under the
 “ directions hereinbefore contained so far as the said interest
 “ dividends and annual proceeds will suffice for these purposes
 “ and after payment of such annuities and legacies do and shall
 “ pay the surplus unexpended of the said interest dividends and
 “ annual proceeds unto the person or persons who for the time
 “ being shall under the limitations and directions hereinafter
 “ contained and expressed be entitled to the beneficial enjoyment
 “ of my real property or of the rents or profits or surplus rents
 “ and profits thereof and so soon as all of the said annuities and

“legacies shall have fallen in and been fully paid and satisfied do
 “and shall stand possessed of and interested in the said Trust
 “monies and securities and the interest dividends and the annual
 “proceeds thereof. In Trust absolutely for the person or persons
 “entitled under the limitations and directions hereinafter con-
 “tained and expressed to the beneficial or absolute enjoyment of
 “my said real property as to the surplus income before the
 “legacies and annuities are paid.”

The observations which I have made with reference to the real or landed property are applicable to this income. As the corpus of the fund, if the gift had been in trust absolutely for the person who at the time when such annuities &c. shall have fallen in and been fully paid and satisfied shall be the person entitled to the rents of the real estate &c. the gift would have been probably void for uncertainty, not only because there is no one who can answer the description and can accept the gift, but because it cannot be ascertained who will be the person entitled to take under the gift, until what must apparently be a remote and uncertain period, which may possibly extend far beyond the limits of the lives of persons now in existence. Even if this gift be treated as coming by way of proviso on the gift of the income of the same fund there is a further element of uncertainty. What is the meaning of the word “person or persons,” &c.?

The word “or” used in its proper and ordinary sense is a disjunctive particle. If that be the true construction the case would resemble that of *Lowndes v. Store* (4 Vesey, 649). I do not think that, as a matter of fact, the insertion of the words “or persons” is a mere accident or mistake of that sort. On the contrary, I believe that it is probable that the Testator had a meaning in writing these words.

The use of this expression which I think cannot be rejected seems to me inconsistent with the notion that any single person was intended to take and be at liberty to use and expend the corpus of the fund absolutely for his own purposes even though the events happen on which it is to go to him. My impression is that if the true construction is that the gift is, an absolute gift of the whole fund to the person who may be en-

titled to the rents of the estate at the time when all the legacies and annuities shall have been paid off, the gift is bad for uncertainty. But if the true construction is that the person then in possession and his successors would take the entire income and profits of the fund without deduction, then it would stand on the same footing as the gift of the surplus income. But there is the third alternative, that it is wholly uncertain what was the Testator's meaning, whether he meant the person entitled to the rents at the time when the legacies and annuities shall have all been paid to take absolutely or not. For myself, I incline to that view.

I think it is not necessary to decide, and indeed we have no power to make any binding decision at the present time as to the surplus income of the personalty, but I concur with the Chief Justice in thinking that the gift of the corpus is void, and therefore that subject to the trusts affecting the income it belongs to the Plaintiff as heir of the Testator.

It is plain that if instead of paying the legacies out of the income, as directed by the Will, the Trustees sell Government paper for that purpose, the interest of the Plaintiff may be most seriously affected.

The result is that I agree with the Chief Justice in his findings on all the issues.

That Joteendro Mohun Tagore, one of the Defendants in such suit, being dissatisfied with such judgment, on the 13th of December, 1869, presented his petition for leave to appeal to Her Majesty in Council from such decree, for the following reasons :—

1st. That the said Testator by his said Will made a valid and legal disposition of the whole of his movable and immovable property, and that the Plaintiff as the Testator's heir-at-law is not entitled to any interest in such property.

2nd. That it ought to have been declared and decreed that the suit was dismissed with costs, to be paid by the Plaintiff.

3rd. That if any decree could properly have been made, other than a decree of dismissal, it ought to have been declared; that the trusts of the said Will ought to be established; and that thereunder, and subject to the payment of debts, legacies, and annuities, in the manner directed by the Will, the Testator's personal estate vested absolutely in your Petitioner, the said Joteendro Mohun Tagore; and that the right and interest of the said Joteendro Mohun Tagore and the other parties interested in the immovable estate of the said Testator ought to have been declared.

4th. That the allegations in the plaint of waste are so vague and general that no inquiry ought to have been directed in that behalf, and that the Plaintiff was not entitled to any account against any of the Defendants.

5th. That the decree ought not to have directed the costs of suit to be paid out of the income of the immovable estate.

That a similar petition against the said judgment was filed by Shourendro Mohun Tagore on the 17th of December, 1869.

That both petitions were subsequently allowed and due security given according to the rules of the High Court.

That the said Ganendro Mohun Tagore, who had omitted to file a petition of appeal from certain points in the decree of the said High Court of the 1st of September, 1869, obtained permission to do so on giving due security. That such petition was duly filed and security given. That the three several appeals were duly consolidated. That with a view of saving expense (at the suggestion as I believe of the Court), a joint petition of Joteendro Mohun Tagore and Shourendro Mohun Tagore was filed, submitting that the decree of the High Court of date the 1st of September, 1869, ought to be reversed, save so much thereof as might be considered favourable or decreeing a benefit under the said Will to these Appellants, or either of them, for the following among other reasons:—

1st. Because the decree of the Lower Court, viz., that of Mr. Justice Phear, was right so far as it dismissed the suit of the Plaintiff (the Respondent), and because therefore the Appel-

late Court ought to have so far affirmed the same but with costs against the Plaintiff.

2nd. Because the Judges in both the said Courts rightly declared and decided that a Hindoo Father has full power under the law of Bengal to alienate by Will, or otherwise, the whole of his ancestral and self-acquired estate and property to the complete disinherison of his Sons and heirs, and that they are not even entitled to maintenance thereout; and because these Judges ought not only to have declared (as they did rightly) that the above-mentioned Testator expressed his intention in his Will to disinherit his Son, the Plaintiff, but that he had done it effectually thereby, and by the devises and bequests in his said Will contained, and that he had thereby legally disposed of the whole of his immovable and movable estate, and not died intestate as to any portion thereof.

3rd. Because the said Judges were also right in declaring and deciding that there is no rule in the Hindoo law against perpetuities, and that there is no express prohibition therein, or in any local Act or Regulation prohibiting a Hindoo from creating or giving successive estates for life, or an estate in tail; and because, therefore, the said Courts ought, by their decrees, to have declared legal and valid, and to have given effect to, the like estates given and limited by the Testator's said Will.

4th. Because the judgment and ruling of the Judges of the said Appellate Court in respect to the declared illegality and invalidity of such successive estates for life after the first, viz., that devised to this Appellant, Joteendro Mohun Tagore, and of all executory devises or bequests, were opposed to the principles laid down and established by the judgment of the Lords of the Judicial Council in the case of *Sreemutty Soorjeemoney Dossee v. Denobundo Mullick* (9 Moore, I. A., p. 135).

5th. Because if it should be considered that to give complete effect to all the estates tail and executory interests created by the Testator's Will would be against public policy, within the meaning and intention of the last-mentioned judgment, then the rule to be laid down is not one of Hindoo law, but one of public law and expediency, as rightly declared in the judgment

of Mr. Justice Phear ; and because, therefore, the rule to be adopted and established by the Courts below ought to have been (according to reason and principle) one in harmony with the rule of English law to prevent perpetuities, which permits property to be tied up during the existence of any number of concurrent lives, and for an additional period measured by the duration of legal infancy and the time of gestation.

6th. Because it is a rule for the construction of Wills, established by the Courts in England, and admitted by the Judges in the Courts below, as governing their decisions, that the intention of a Testator is to be given effect to and carried out so far as the law will admit ; and because, further, the Testator himself, in the present case, has expressly declared, in and by his said Will, that his intention was, and he accordingly thereby also willed and directed, that the provisions, directions, and limitations in the said Will contained and expressed, should be given effect to and carried out so far only as such provisions, directions, and limitations can be introduced into any deed of conveyance or settlement without infringing any law against perpetuities which may then be in force and apply to the real estate ; and he also, by his said Will, expressed his intention thereby to settle and dispose of the whole of his estate generally as fully and completely as the law would permit him to give or control the inheritance for the benefit of the persons specially named in the Will, or some or one of them ; and because, therefore, the Judges of the said High Court ought to have put such a construction on the said Will as would best give effect to and carry out the said expressed intention of the Testator.

7th. Because it is also a rule for the construction of Wills, established by the Courts in England (and not of positive law), that expressions which, if applied to real estate, would confer an estate tail, shall, when applied to personal property, simply give the absolute interest ; and inasmuch as the immovable estate of a Hindoo, being free from the incidents and ideas arising out of feudal tenure which are attached to and made to govern and restrict the alienation of real estate in England, is undistinguishable (legally) in any material respect from movable or

personal estate, the Courts below ought to have decided according to such rule, and ought to have held and decreed that the devisee, who (after the death of the last of the persons taking life estate) would have been the first entitled to an estate in tail (if valid), should take and hold (instead thereof) the absolute estate and interest vested in the said Testator at the time of his decease.

8th. Because it ought to have been held and decreed that the movable or personal estate of the said Testator (which species of property, even under the English law, has nothing to do with feudal rules as to possession) was, both as to its income and corpus, fully and effectually bequeathed to the Executors and Trustees, and because the said Court, being a Court of Equity, as law, ought by its decree to have enforced the trusts declared of and respecting the said movable estate, afterward subject to the payment thereof of debts, legacies, and annuities, in favour of the persons beneficially interested therein, and named in the said Will.

9th. Because the said decree ought also to have declared and decided that the Plaintiff (the above Respondent) neither had proved any right to any portion of the estate of the said Testator through partial intestacy, nor alleged, much less proved, any such clear and sufficient case of waste as would be required in order to entitle him to an account against the said Executors, and because, therefore, the Appellate Court ought not to have made the order remanding the suit to the Lower Court for the purposes and objects in such order directed.

10th. Because the Executors were entitled and empowered, in a due course of administration of the said estate, and under and by virtue of the provisions of the said Will, to pay and discharge the debts of the said Testator by means of the sale and application of the proceeds of the said Company's paper, part of the said movable estate.

11th. Because the said Appellate Court ought not to have decreed the payment of the costs of the said suit out of the income or rents of the immovable estate, more especially as the same are only made (by the said Will) liable to contribute to cer-

tain specified objects on an ascertained deficiency of the movable or personal estate, and no such deficiency being either alleged or in fact existing.

12th. Because the Testator's estate, both real and personal, having been conveyed to, and absolutely vested in, the Executors and Trustees aforesaid, for the benefit of others, contradistinguished from the Plaintiff (the above Respondent), with the additional direction that the Plaintiff, having received sufficient in the lifetime of the Testator, was not to take anything under the Will or the trusts thereof, distinctly negatives any resulting trust for the said Plaintiff.

13th. Because this Appellant, Sourendro Mohun Tagore, and failing him his Son, Pronotho Coomar Tagore, will be entitled, in preference to the above Respondent, to the estate immovable and movable of the said Testator, after the determination of the interest given to this other Appellant, Joteendro Mohun Tagore, and his issue, either by the extinction of that branch, or by reason of the devise to the unborn issue of Joteendro Mohun Tagore being held to be bad on any ground whatever.

That the said Ganendro Mohun Tagore duly filed his case in the office of the Honorable the Privy Council, and submitted that the decree of the Court below, so far as it declared in favour of the right of a Testator to dispose of all his property by Will, and so as to disentitle him (the Appellant) to maintenance out of the estate, and so far as it declared that the devises and gifts to Joteendro Mohun Tagore for life are valid; and that, subject as in the decree mentioned, he was entitled for life to the beneficial enjoyment of the real property, and the rents and surplus rents thereof; and that, until the legacies and annuities should fall in and be fully satisfied, he was entitled to receive 2,500 Rupees per month out of the net rents of the immovable property, and also the surplus rents of the immovable property, and the unexpended surplus of the interest, dividends, and proceeds of the movable property which should from time to time remain unexpended, after making the payments directed by the said Will to be made out of the said rents, interest, and dividends; and that he was entitled for life to the use and

enjoyment of the library, carriages, horses, farm yard, furniture, jewels, gold and silver plates, and other articles in the said decree mentioned. And so far as it declared that it was not necessary to come to any further finding upon the residue of the 4th issue, or to make any declaration of rights, so far as they related to the immovable, or to any portion of the rents thereof, or to the surplus income of the personalty, so long as the debts, legacies, and annuities were unsatisfied, ought to be reversed, and that in all other respects the said decree ought to be affirmed, for, amongst others, the following reasons:—

1st. Because, although the testamentary power of a Hindoo is admitted to exist in Bengal, to such an extent as to enable him to give away his property, so far as the Hindoo law would permit him to dispose thereof by gift in his lifetime, still that no bequest could be made by a Hindoo, even in Bengal, which is inconsistent with the Hindoo law affecting gifts.

2nd. Because a Hindoo, even in Bengal, cannot by Will deprive of maintenance out of his estate those persons who are entitled by Hindoo law to maintenance, amongst whom are Sons, whether legitimate or illegitimate.

3rd. Because, according to Hindoo law, a gift made must be accepted by the donees, to make the gift valid.

4th. Because the Testator constituted as donees Ramanauth Tagore, Woopendro Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee jointly; and inasmuch as Ramanauth Tagore did not accept such gift, the same became invalid and incomplete, and the property passed to or remained in this Appellant as heir, subject to such charges created by the said Will as are valid by Hindoo law.

5th. Because the said Will attempts to create estates which, though known to English law, are wholly inapplicable to and unknown by Hindoo law and customs.

6th. Because, in order to make a gift good, according to Hindoo law, there must be certainty as to the person of the donee, the immediate receiving by him, or his guardian, of the subject-matters of the gift on its relinquishment by the donor, and a power of acceptance on the part of the donee

at the time of such relinquishment, but which necessary circumstances do not exist in the gifts or (so-called) bequests and devises in the Will contained.

7th. Because the gifts to Joteendro Mohun Tagore are invalid on account of their vagueness and uncertainty.

8th. Because there is in Hindoo law no distinction in principle as to the succession to a disposal of landed property and movable property, save so far as restrictions exist in respect of ancestral immovable property.

9th. Because by Hindoo law a life estate, similar to the freehold life estate known to English law, cannot be created either in immovable or movable property, the only life estates known to the Hindoo law being those peculiar estates of Hindoo Widows and other females of the family who take on the death of a Husband or a Father.

10th. Because the English doctrine of Trustees supporting contingent remainders is unknown to the Hindoo law.

11th. Because the rule in question attempts to create estates tail, which it is not competent for a Hindoo to create.

12th. Because the various bequests in the Will are contrary to the rule and policy of all law, as tending to create perpetuities, and to postpone the taking of a benefit under the Will to a future uncertain time.

13th. Because a donee cannot accept property on behalf of an unborn person.

14th. Because, even if the bequest for life be good, any bequest to a person not in existence at the time of the Testator's death, subject to the life estate or interest, is void, unless it comprise the whole interest of the Testator in the thing bequeathed.*

15th. Because, as to the surplus income, it is wholly uncertain who may become entitled thereto under the Will, and therefore this Appellant, as heir, is entitled.

16th. Because the provisions as to the said estates being at some future time conveyed over, are void for uncertainty,

* This is the 100th clause in the Succession Act, which has no application to the case.

and as directing the creation of estates impossible according to Hindoo law.

17th. Because the doctrine of *cy-pres* does not apply to Hindoo Wills ; but, even if it did, the terms of this Will do not entitle that doctrine to be applied.

18th. Because there was nothing in the law or practice of the High Court to prevent a complete final decree being made on the residue of the 4th issue, and as to the effect of the Will as to all the so-called devises and bequests ; the case of *Lady Langdale v. Briggs* not being applicable to this case.

19th. Because it is impossible to give effect to this Will, save so far as the legacies and annuities are concerned, and what may be declared as forming a charge on the inheritance, without introducing doctrines of English law which are wholly inapplicable to the Hindoo law, and without applying English doctrines of uses and trusts, executory devises and contingent remainders, which are wholly inapplicable to the usages and customs of Hindoos, and the doctrines of gifts recognized by that law, as being founded on popular recognition.

20th. Because an heir cannot be disinherited without the estate being validly given over to some other person, and in the event of the donee not accepting, or the gift being in any way invalid, the estate continues in the hands of the heir.

21st. Because the Appellant is entitled to have the case referred back to the Court of original jurisdiction, for the purpose of having there tried the 7th issue, as directed by the Appellate Court.

22nd. Because, according to the Hindoo law, an inheritance, unless from religious and spiritual considerations, cannot be kept in abeyance, but on the demise of an owner it vests in the next heir or successor, and the right of occupancy is co-ordinate with succession to the inheritance, subject, as it may be, to burthens for maintenance, annuities, or legacies.

The case came on for hearing before the Honorable Judges of the Privy Council early in 1872 ; Sir Roundell Palmer, myself, and Mr. Leith appearing for Jotcendro Mohun Tagore ; Mr. Forsyth and Mr. Doyne for Sourendro

Mohun Tagore and his infant Son, to whom successive life interests in the real estate, contingent on the death of Joteendro Mohun Tagore without male issue, was given by the Will; and Mr. Joshua Williams and Mr. Bell for the Plaintiff in the Court below, Ganendro Mohun Tagore.

The case was heard for several days. I have no note of the arguments of Counsel; but a full report of the same, together with the arguments of the opposing Counsel, will no doubt be given by the worthy and respected Queen's Counsel, Mr. Moore, who edits the Indian Appeal Reports of the Privy Council. In order to show on what grounds we impeached the decision pronounced by the High Court of Calcutta, I will now lay before the reader the various remarks which were drawn up by myself, and furnished to two of the Counsel, and which, either by myself or others, were in a great degree brought to the notice of the Court. I have added, also, some additional remarks in the present paper, in order that the public generally, and especially the many learned members of my own profession, may have an opportunity of examining the accuracy of the decision pronounced, which I shall subsequently examine.

The Testator, Prosoono Coomar Tagore, died in Calcutta on the 30th of August, 1868, possessed of land and personal estate in Calcutta, and also of large Zemindaries and lands situate in the Province of Bengal. He was an inhabitant of Calcutta, and domiciled there. He had separated himself many years from the other members of his family, receiving his share of the family property.

By a Will executed on the 10th October, 1862, he conveyed the whole of his estate, real and personal, to four Executors and Trustees and their heirs, to hold the same upon the trusts declared by his Will. First, as to the personalty, he directed his debts, legacies, and annuities to be paid within one year from the time of his death, and, after paying such, his Executors were (with certain exceptions) to sell his personal estate and invest the same on good securities; and after paying legacies and annuities, they were to pay the surplus interest and dividends

to the person beneficially entitled to the enjoyment of his real estate, or of the profits or surplus rents thereof; but as soon as all legacies and annuities were paid or had fallen in, that then they should stand possessed of the said trusts, funds, and interest and dividends and annual proceeds, in trust absolutely for the person or persons entitled under the limitations and directions mentioned to the beneficial enjoyment of his real property. The Testator also directed that all the bequests or legacies given by him should be vested. With reference to his real estate, he charged it with the payment of such of his debts, legacies, and annuities as the *personal estate or the profits thereof* might be inadequate to pay; and after various limitations in tail, according to the law of primogeniture, to the Sons of his Brothers. He directed the Executors and Trustees to hold the real estate generally for the use and benefit of the parties entitled to the beneficial enjoyment of such real estate, then, after applying the rents of such estate to the cost of management of the estate in Calcutta and the Mofussil, he directed that, out of the clear annual income which might remain, the party entitled to the beneficial enjoyment was to receive for his own use Rs. 2,500 per month, and that the various legacies and annuities should only be paid gradually and as might be convenient. And he further directed that they should pay the residue of the rents and profits which should from time to time remain unexpended, after making the payments directed to the person or persons to whom for the time being he had given the real estate. The Testator also directed that 5 per cent. should be allowed on the legacies and annuities to be paid. And as soon as all legacies and annuities were paid, *to convey his real estate and premises to the use of the person who should, under the limitations and directions in his said Will contained, be entitled to the beneficial interest therein.* Two Codicils were executed by the Testator, which I need not notice, as nothing turns on them, except so far as directing the legacies to be paid as soon as conveniently might be, and vesting the same.

The suit of the Plaintiff was dismissed by Mr. Justice Phear.

The Chief Justice, in accordance with Mr. Justice Norman, reversed such judgment; deciding, 1st. That a Hindoo Testator

could not, by Hindoo law, create an estate tail, and certainly not an estate descendible to heirs male, according to the law of primogeniture; 2ndly. That the gift to the unborn Son of Joteendro was void, and that there could be no such gift to a party not in existence, by Hindoo law; and 3rdly. That the Testator had died intestate as to certain portions of his property. I put this last finding generally, for when I come to examine the clauses in the Will, I will bend my attention more particularly alike to the personal and real estate.

It may be as well that I should clear my way by disposing of the second question.

The opinion of the Court, that a gift to the unborn Son of a party is void, is a startling proposition.

One of the earliest cases is the case of *Verapermah Pillay v. Narain Pillay* (Vol. I. Notes of Cases at Madras, p. 81). In that case the words of the Will were: "Having no Son of my own, and anxious for the performance of my Shradda, I wish to be represented by adoption, and would willingly prefer for that purpose a Son of Iyah Pillay. His Wife is at this moment pregnant. They are also young people. If, then, he begets another Son (word equally descriptive of the one of which she was then pregnant as to any future one she might have conceived), let him be kept to my lineage." (See p. 98, where it is shown that the Calcutta Pundits were unanimously of opinion that an unborn Son might be adopted.)

The next case is one reported in *Morley's Notes of Cases*, Vol. II., No. 10, 24th March, 1814. An adoption was made fifteen years after death. It was held that an adoption could be made at any time during life of Widow.

The point whether she could adopt a child not in existence was distinctly put to the Pundits, and the answer was that she could (2 *Morley*, 1849).

A man leaving a legitimate Son may not only authorize his Wife to adopt a Son after his death, failing such Son, but also failing such Son's Son (*Mae, H. L.*, Vol. I. pp. 83 and 84; *Saumchurn*, 761. See also *S. D. A.*, 1845, p. 206, *Ranee Hurree Prea v. Rajah Suchmenarain*, as to successive adoptions).

The next case is in 3 S. D. A., pp. 367, 370 (Rankissen Surkeloll). Pundit's opinion to the second question adopted by Court (p. 372), that it had been established that the adoption of Isurer Chund had been made with the authority of the Husband, previously received, and with the consent of the Father-in-law, and that a delay of ten years before such an authority was acted upon was not illegal. (Daya Bhaga, p. 136, c. 7, pars. 1 & 5. *See* note (4), where the right is expressly declared. *See* also pars. 10, 11, and 12.)

The same principle is laid down in the Mitaschera, pp. 280, 281, 282; and also in the Maykooka, p. 63.

The principle assumed by the Court below contradicts the whole line of authorities.

Look at the case of an appointed Daughter (*see* Daya Bhaga, pp. 152, 153, c. 10, ss. 1 and 2). Now look at par. 6, p. 154. But if a Daughter, being actually appointed, become a Widow without having borne a Son, or if she be ascertained to be barren, she has not in that case a right to her Father's wealth, since the appointment was made for the sake of a Son who may perform obsequies; and, on failure of that, she is like any other Daughter. (*See* Colebrooke's Digest, Vol. III. p. 193.)

A damsel given in marriage by her Father with a declaration in this form, "The Son who shall be born of her shall be my Son," is an appointed Daughter; and even though not given according to the form of appointing a Daughter to raise up issue for her Father, she is considered as such if she has no brother, and were appointed by an implied intention. At pp. 192 and 193, 3 Digest, the declaration of appointment precedes the birth of the Son, and the Daughter would take the inheritance, and the Son afterwards (p. 194).

See Mitaschera, p. 303, c. 1, s. 11, par. 3, and read note.

The Court will see to what extent the Court has gone in some cases. In Rance Kissen Manee v. Rajah Godwunt Singh (3 S. D. A., p. 228), the Pundit, in answer to a case put by the Court, held, that where permission had been given to adopt, it had the same effect as if the child had been conceived.

The next case is *Begayah Dabee v. Shamee Soondery Dabee* (S. D. A., 1848, p. 762).

In this case the Court observed: The Plaintiff sues for her share of the estate as heir to her deceased Son, and in her plaint set forth that she had power to adopt a Son. The question was put to the Pundit, whether a Widow with power from her Husband to adopt can sue as heir in her own right for a share of the ancestral estate. The Pundit replies distinctly that she cannot. In fact, it was laid down by the Pundits in 3 S. D. A., p. 228, that the moment permission to a Widow to adopt a Son was pronounced, it had the same effect as if a child had been conceived, and the Court, one Judge differing, gave judgment accordingly.

The next important decision is one at p. 5 of 6 S. D. A., by Sutherland. The marginal note will be sufficient: "Notwithstanding what is said by Mr. Macnaghten, the adoption of the Daughter of a Brother, with the condition that her eldest Son shall be the 'putrica putra' (Son of Daughter), is legal. But it is essential to the validity of the adoption that it take place previous to her marriage."

In the case at p. 324 (*Mussumut Salukna v. Nundololl Pande*, at p. 1 S. D. A.), the Court actually reserve in their decree shares for the children which may come into existence.

Another case is that of *Karuna Mai v. Jaichunder Doss*, repeated at p. 42 of 5 S. D. A. (Sutherland). The marginal note is: "In Bengal a Sister's Son (even though unborn and unbegotten at the time of his maternal Uncle's death) is an heir preferable to the Son of the paternal Uncle deceased, and a Sister likely to produce male issue (though having none), as Trustee for such issue, enters on the succession of her deceased Brother's estate, to the exclusion of paternal Uncle's Sons."

In the case of *Kissen Lochun Bose v. Tarrani Dossee*, p. 56, 5 S. D. A. (Sutherland), there is the following marginal statement: "Under the Hindoo law, as received in Bengal, the Pundits of the Sudder Dewanny Adawlut prefer the right of the Sister's

Son (though not born at the time of his maternal Uncle's death) to that of his paternal Uncle's Son."

I now come to the important case of Burnun Doss Mookerjee v. Mussumut Tarnee, in the Sudder Dewanny Adawlut of 1850, p. 533. The judgment was delivered by Mr. John Colvin. I cite this case the more willingly, because when it came before this tribunal on appeal (7 Moore, p. 206), the Court, in giving judgment, observed: "On considering this judgment, which is most able and elaborate, they entirely agree with the principle laid down in it, and can add nothing to the *clearness and force of the reasoning*. They have, therefore, simply to express their entire concurrence in the judgment of the Sudder Court, both upon the question of law and the question of fact, with the single qualification of that incidental observation made upon the language of the Zillah Judge in expressing his opinion with respect to the two attesting witnesses."

The principle maintained by the Pundits in the case of Ranee Kissen Money, at p. 228 of 3 S. D. A., was this: that the moment permission to adopt was given, it had the same effect as if a child had been conceived. Now this principle was acted on by Messrs. Tucker and Hawkins in the case I have cited.

In noticing these decisions, Mr. John Colvin, at p. 538, quotes the various passages in the Daya Bhaga and Mitacschera which allude to Sons not in existence. The question determined was, that the present right of inheritance vested in the Widow was not superseded or destroyed by the fact of her holding permission from her Husband to adopt a Son, and that therefore her suit as Widow will lie though she mentioned in her plaint that she had authority from her Husband to adopt, and that the right of a Son vests from adoption only.

Mr. Colvin, in his judgment, after noticing the different passages in the Daya Bhaga and Mitacschera which allude to Sons not in existence, and citing the passage, "Those who are born and those who are unbegotten, and they who are in the womb, all require the means of support, and where the dissipation of their hereditary maintenance is censured." Upon this passage

observes Mr. Colvin, it has been contended on behalf of the Widow, that it prescribes a moral duty rather than a legal obligation, as, were it held to be of strict legal force, it would militate against the *admitted right of a Hindoo Father in Bengal to dispose of his property according to his own choice by Will*; but, apart from this, it is to be observed that the very terms of the text providing for Sons *yet unbegotten refer to a contingent and future, and not a present right*. In perfect consistency with this, we find that the right accruing to an after-born Son in regard to real ancestral property is similarly described in the same treatise; and here I may remark, that where provision is to be made for after-born Sons, it is consonant to reason that any gift or bequest to them should be valid. Mr. Colvin came to the conclusion against the two former decisions, that the Widow had a right to sue.

He alludes to the case in 1 S. D. A., p. 324, which I have cited in support of the view he adopts there. A decree was given by Mr. Harrington in favour of six Daughters' Sons, with reservation of the eventual birth of other Daughters' Sons.

He also alludes to a note of Mr. Sutherland's, at p. 315 of Vol. V. S. D. A., that the right of succession cannot remain in abeyance in expectation of the future production of an heir, and *shows that such a note was not authorized by the case itself* (p. 542); and he distinguishes the case of Lucki Priha, Vol. V. S. D. A., from the case under consideration.

It is in no degree important for me to enter into the discussion whether, when the owner dies, the property does or does not vest in possession, as such a point does not arise in this case. It is sufficient for me to show that the proposition laid down, that an interest cannot be given to an unborn person, is unwarranted by authority. (Refer to S. D. A., 1860, given at p. 7 of Saumchurn's Work, octavo edition. See also Prosono's opinion, at p. 257, where he takes the very words used by Mr. Colvin.) In the case decided by Mr. Colvin ten years had elapsed: he expressly says that such would not vitiate the adoption. Let me now see whether there are not some authorities decided by the Privy Council on the subject.

In the case in 3 Moore, I. A., p. 229, Dhurm Doss Pandey v. Mussumut Shama Soonderee Dabee. This was a case of a deed executed in 1817, giving authority to Widow to adopt. On the 8th September, 1827, the Widow filed her plaint, and since institution of suit adopted. In this case the adoption was after ten years, and consequently the Son could not have been born ; no objection, however, was taken on that head.

There is also another case in 8 Moore, 477 (Chundermoney v. Mumeroye). In this case, if the principle laid down by the Court were true, the Court below and the Privy Council might have saved themselves the trouble of examining the evidence in the cause, for the adoption did not take place till seventeen years after the death of the party.

The reason why Mr. Colvin directs his attention particularly to the case arose, not from imagining that a party could not give authority to adopt a party not in existence, but that an adopted Son took from the time of adoption. If he had held the doctrine propounded by the Chief Justice (*see* Moore, Privy Council, Vol. VII., p. 169), that nothing could be given unless a party was in existence, his decision would have been manifestly wrong, for the adoption did not take place till many years after her Husband's death. Let it be remembered, also, that in the case of a written authority from the Husband to adopt, the party adopted would take the estate, though not in existence at the time of authority given.

Mr. Colvin admirably distinguishes the case of Lucki Priha from the other cases. I will add another distinction. It was a case in which the Stepmother and Half-Sister claimed the estate of her Brother of the half blood against a Nephew of the whole blood. The case is as distinct from Gunga Mai's case as the poles are asunder.

Mr. Wynch, in the Daya Crama Sangraha, shows that "Sons born after partition may take property." (*See* c. 5, ss. 20, 21, 23 and 24, pp. 89, 90.)

Again, if the principle laid down by the Chief Justice be true, this Honorable Court would have no difficulty in disposing of the case of Mussumut Boobum Moya Deebee v. Raw-

kepane Ashagee Chowdry, in 10 Moore, I. A., 307, for there clearly the Son to be adopted was not in existence at the time of authority given. It is quite clear that such case can have no applicability to the circumstances of the present. The words of the Court, at p. 307, preclude it :—" We think the instrument genuine, but unnecessary to examine into the genuineness of it, as we are of opinion that at the time when Chunderballie Dabee professed to exercise it, the power was incapable of execution."

If the case should rest upon the principle that the authority given should be exercised within a reasonable time, it can have no application to the present case, for Joteendro is living, may have a Son, or may adopt. With reference to the above case, the observations of Saumchurn are worthy of attention, and the remarks of Sir Edward Ryan Fulton's Reports (393) are also deserving of consideration. The case of Kissen Govind v. Ludlee Mohun Tagore (2 D. A., p. 309), was the case of a Hindoo who had no Son executing a deed whereby he granted to his senior Widow the whole of his acquired property in the event of no Son being born, but in the event of a Son being born, the property was to go to him.

On the question about giving to an unborn Son, I may observe : No one writer on Hindoo law, or any one case among the numerous decisions which have been passed, has ever supported the doctrine promulgated by the Court below. The point of divergence between the two Schools was this : The Pundits of the Bengal School holding that an after-born Son's right could be affected on account of his not being alive when the succession opened ; whereas the opponent Pundits maintained, *not that an unborn Son could never inherit*, but that his right to inherit was dependent on the contingency of his being in existence at the time when the succession was vacated. Such an assumption of the illegality of a grant to an unborn person disappears on the mere statement of the nature of the dispute between the two Schools. I may here remark that the passage in the Daya Bhaga, c. 1, par. 21, p. 10, merely means that men, not animals, are the parties to whom a gift may be made ; and this is clear

from the illustration of letting loose the bull at the funeral. If it were taken in the sense contended for by the Chief Justice in the Court below, it would prevent a man from conveying his estate by Will to the party he directs to be adopted. The whole of the reasoning of the Chief Justice in the case, taken from the 3 Bengal Reports, and above given, is absolutely inconsistent with what he maintains under this passage in the *Daya Bhaga*, and is especially in direct opposition to the text—"They who are born, and they who are yet unbegotten, and they who are yet in the womb, require the means of support. No gift or sale should therefore be made." Surely, if parties are directed to preserve property for those unborn, a gift founded on the contingency of a party coming into existence within a reasonable time, cannot be illegal.

The dedication of a tank, according to the *Dattaca Chandrika*, p. 103, c. 2, s. 42, would certainly be available for after-born parties.

I will now proceed to inquire what rights parties have over their estates in the *Mofussil*, either by the Regulations of Government or by Hindoo law; 2ndly. I will call attention to various decisions of Courts of Justice which may throw light on the tenure of property; and 3rdly. I will then examine the rights of parties over property within the local jurisdiction of the High Court.

It will not, I apprehend, be disputed that the construction of the present Will must be determined by Hindoo law. I need only refer to the following authorities, 6 Moore, I. A., p. 551; 7 Moore, I. A., p. 64; and 8 Moore, I. A., p. 85, in support of such a proposition.

The Regulations of Government, and the statute 21 Geo. III. c. 70, s. 17, lay down the same principle. By s. 15 of Regulation 4 of 1793, the following is the rule for the guidance of the *Mofussil* Courts:—In suits regarding succession, inheritance, marriage, and caste, and all religious institutions, the Mahomedan laws, with regard to Mahomedans, and the Hindoo laws, with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions.

In cases which do not fall under the above clause, the Courts are to be guided by Regulation 3 of 1793, s. 21; Regulation 6 of 1793, s. 31; and Regulation 2 of 1803, s. 17.

The 17th section of 21 Geo. III. c. 70, with reference to the then Supreme Court, provides that the inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos; and when only one of the parties shall be a Mahomedan or Gento, by the law and usages of the Defendant.

In the present case it is of essential importance to see what right or authority Hindoo Zemindars or landed proprietors have over their estates in the Mofussil.

This will be found by attending to the provisions of the Government Regulations. Lord Cornwallis's Code is contained in Regulations 1 to 48 of 1793.

By Regulation 1 of 1793, s. 4, art. 3, the Governor-General in Council declares to the Zemindars, independent Talookdars, and other actual proprietors of land, with or on behalf of whom a Settlement has been concluded under the Regulations above mentioned, that at the expiration of the term of the Settlement, no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever.

By the same Regulation 1 of 1793, s. 9, art. 8 enacts that no doubt may be entertained whether proprietors of land are entitled under the existing Regulations to dispose of their estates without the previous sanction of Government.

The Governor-General in Council notifies to the Zemindars, Talookdars, and other proprietors of land, that they are privileged to transfer to *whomsoever they may think proper, by sale, gift, or otherwise, their proprietary right in the whole or in any part of their estates without application to Government for its sanction to the transfer, and that all such transfers shall be held*

valid, provided they be conformable to the Hindoo or Mahomedan law, and not repugnant to any Regulation that may be passed. There was one exception in this Code—leases above ten years were prohibited (*see* Regulation 5 of 1812, s. 2). This has been rescinded by Regulation 18 of 1812, and parties are now at liberty to make leases even in perpetuity if they please.

The next Regulation is 11 of 1793, s. 1, which recites that a custom prevailed that Zemindaries were not liable to division, but devolved entire on the eldest Son; and in the second section it enacts that, “after the 1st of July, 1794, if any Zemindar, Talookdar, or other proprietor of land should die without having declared, *by writing or verbally, to whom or in what manner his or her landed estate is to devolve after his or her demise, and shall leave two or more heirs who, by the Hindoo or Mahomedan law, may be respectively entitled to succeed to a portion of the landed property of the deceased, such person shall succeed to the shares to which they may be so entitled.*”

Then come one or two clauses which are unimportant.

I now approach the 6th clause.

“Nothing in this Regulation shall prohibit any actual proprietor of land bequeathing or transferring by Will or by declaration, in writing or verbally, either prior or subsequent to the 1st of July, 1794, his or her landed estate entire to his or her eldest Son or next heir, or other Son or heir, *in exclusion of all other Sons or heirs, or to any person or persons in the proportions* AND TO BE HELD IN THE MANNER WHICH SUCH PROPRIETOR MAY THINK PROPER, provided the bequest or transfer be made not repugnant to any Regulation that may have been or may be passed by the Governor-General in Council, nor contrary to the Hindoo or Mahomedan law, and that the bequest or transfer, whether made by Will or verbally, be authenticated or made before such witnesses and in such manner as those laws and Regulations require.”

It will be remembered, with reference to such Regulations, that they form the Code of the country, and the Legislature

are pointing to the existing practice, only requiring that it should be regulated by law. The reason why the qualification was inserted is easily explained; the Code in question applied to Bengal, Behar, and Orissa. With reference to ancestral landed property in Behar and Orissa, Sons are alleged by the Mitacschera to have by birth an interest in such lands. No such right exists by the law of Bengal. This is one of the leading points of difference between the Daya Bhaga and the Mitacschera. After this Code had been in force a year or so, Regulation 5 of 1799 was passed. It recites that doubt had been entertained whether the Courts in Bengal, Behar, and Orissa were authorized to interfere in cases where the inhabitants of the above Province had left Wills, and appointed Executors to carry the same into effect, or may have died intestate, leaving an estate, real or personal.

With a view to remove all doubt, and to apply thereto as far as possible the principle prescribed by section 15 of Regulation 4 of 1793, viz., that in suits regarding succession and inheritance the Mahomedan law, with respect to Mahomedans, and the Hindoo law, with respect to the Hindoos, be the general rule for the guidance of the Judge, the Vice-President has passed the following Regulation 5 of 1799, s. 2 :—In all cases of Hindoos and Mahomedans, or other persons subject to the jurisdiction of the Zillah or City Courts, having at his death *left a Will, and appointed Executor or Executors to carry the same into effect, and in which* the heir of the deceased may not be a disqualified landholder, subject to the superintendence of the Courts of Wards, the Executors so appointed *are to take charge of the estate of the deceased, and to proceed in the execution of their trusts* ACCORDING TO THE WILL OF THE DECEASED, and the laws and usages of the country, without any application to the Judge of the Dewanny Adawlut, or any other officer of Government, for his sanction, and Courts of Justice are prohibited to interfere in such cases except on a regular complaint of breach of trust, or otherwise, when they are to take cognizance of such complaint in common with all others of a civil nature. It is pretty clear, therefore, that at

this time Wills must have been generally established, and an attention to this Regulation might have saved the High Court in one case from deciding that a trust was unknown to the laws as applicable to the Hindoos. Even without the aid of this Regulation, one would have thought that the moment property is established, that instant fiduciary relations necessarily arise. An attention to the words of this Regulation might also have saved the Chief Justice some pages of examination. The statement prepared by me contained the whole of the decisions on the subject of Wills, ending with the judgment of the five Judges of the Sudder, which has been hereinbefore set forth.

The statement further proceeded to show that the opinion of the five Sudder Judges, which I have above given, has been supported by the Privy Council in 6 Moore, I. A., p. 344, where the Court observe, "That throughout Bengal, a man who is the absolute owner of property may now dispose of it by Will as he pleases, whether it be ancestral or not;" also in 9 Moore, I. A., p. 135, the Court observe: "Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and is now completely established." Moreover, in 10 Moore, I. A., p. 309, Lord Kingsdown observed, "That there is no doubt that by the decisions of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal."

In the well-considered judgment of Lord Lyndhurst, reported in 1 Moore, I. A., p. 342, which had *reference to property in Bengal*, he observes, regarding the Regulations which form the permanent Settlement, "I think it is to be collected from these Regulations that the proprietors of land in India had an absolute ownership and dominion of the soil, and that the soil was not vested generally in the Sovereign; that the proprietors did not hold at the will of the Sovereign, but held the property as their own, with the power of disposing of it absolutely, and if not disposed of, it descended to their families. I think it impossible," observed Lord Lyndhurst, "to

read these Regulations without coming to the conclusion that the Zemindars and Talookdars were owners of the soil, subject only to a tribute, and that the object was to make that tribute permanent."

The remarks of Lord Lyndhurst are fully borne out by the clauses of the Regulations I have read; but the expression of absolute dominion does not refer to a limited or restricted interest, but to a case where he has the power of disposing of the whole. While on this head, I may as well refer to Regulation 5 of 1812, s. 2, explained by Regulation 18 of 1812, which recites, that doubts having arisen in the construction of Regulation 5 of 1812, s. 2, it was thereby explained that the true intent of the said section was to declare proprietors of land competent to grant leases for any period, *even to perpetuity*, and at any rent which they might deem conducive to their interests. Provided, however, that nothing herein contained in the former or present Regulation should be construed to empower persons *holding a restricted interest in estates, whether for life or for other limited period, or subject to control or restriction in the use or disposal of the property, to grant leases beyond the term of their own interests in the property, or exceeding their power or authority over it.*

Now let me see what opinions have been held by particular Judges as to the right to will—I mean so far as it is a general or a restricted right, according to the law of Bengal. Sir F. Macnaghten, p. 318, gives the opinion of Mr. Colebrooke, which he corrected, and which I have above given. At p. 319 of Sir Francis' work, he says, speaking of the Supreme Court, "It has never, indeed, declared, nor do I know that it has ever been called on to declare, any restraint as to the disposition of ancestral immovable property. It has declared, on the contrary, that there is no such restraint." Speaking of Nemychurn's Will, at p. 348, Sir Francis considered that a disposition by Will meant at his pleasure. But let us look at the law as laid down by writers who follow the Benares School. In the Mitacshera, 279, quarto edition, c. 1, s. 5, pars. 9 and 10, and the latter part of 11, show that in self-acquired property,

whether real or personal, a Testator can do with it what he pleases.

If we look at the Mitilha School, we shall find the same principle maintained at p. 76 of the Chintimani. It is stated that self-acquired property, in cases where the Mitacshera prevails, may be disposed of by the owner at his pleasure. Even divided parties, where the Mitacshera prevails, can do what they please with the real or personal estate (Chintimani, p. 314).

But now let me see what has been decided in other cases before the Privy Council.

The case of Rada Persand v. Radha Bebee (4 Moore, I. A., 137), is a direct authority to show that in the North-West Provinces, where the Mitacshera is the ruling guide, self-acquired property, whether real or personal, may be willed away. In the case of a Parsee at Bombay (6 Moore, I. A., p. 448), at p. 461 the Court observe: "*It has not been alleged they are prohibited from doing so by any restrictive law.*"

Moreover, Lord Kingsdown, in Abraham v. Abraham (9 Moore, I. A., p. 243), observes: "Now Mathew Abraham acquired the nucleus of his property himself. *No law imposed any fetter upon him as to his mode of dealing with it.*"

From the General Regulations of Government, there appears no limit as to the general authority of Zemindars and other landholders in transferring their interests; and even leases would not be void if made in perpetuity. The Chief Justice admits "that there is no rule of Hindoo law expressly providing against perpetuities;" indeed, he could not do otherwise, after his former judgment in the case of Goberdhone Byrack v. Shaw Chund Byrack, delivered in October, 1862, and reported in the "Englishman" on the 26th October, 1862. There, in observing on the case of Kistochunder Seal v. Kuronamaye Dossee, in Boulnois' Reports, p. 211, the following observation fell from him, when referring to the decision in Boulnois' Reports:—"The Court seem to treat the power of making a Will as unknown to the general Hindoo law, and to be founded on local custom sanctioned by judicial decisions, and, therefore, was

not to be unbounded, but subject to be controlled by the policy of the general law, to which the person exercising it, or the property over which it was exercised, was subject. They therefore thought it necessary to invoke some foreign law; and as to the property situated in Chinsurah, at which place the Testator died domiciled, whilst it was a Dutch settlement, invoked the Roman-Dutch law as to all the property, except the immovable estate beyond the bounds of the Dutch territories, and as to that they invoked the English law. As to the former property, they held that the disposition, though bad according to English law, because tending to alter in perpetuity the rules of succession, was, upon the evidence, to be deemed valid according to the Dutch-Roman law.

“As to the lands situate beyond the limits of the Roman-Dutch territories, they say: It seems to us, therefore, that the Testator’s intention was to limit the succession of his property as above described, and that that intention was one which, according to the Dutch-Roman law, ought to prevail. We have not been referred to any rule or authority of Hindoo law which affects the question, nor have we ourselves been able to find one; we are, therefore, of necessity driven to some foreign law.”

Notwithstanding the very high respect which we entertain for the opinion of the learned Judges who decided that case, we find ourselves unable to act upon that decision. It appears to us that the validity of the Will must be determined according to Hindoo law, and according to that law alone.

If that law contains no rule against perpetuities, we must hold that it is not by that law invalid, upon the ground that it tends to create a perpetuity. Then why are we to resort to some other foreign law which disallows perpetuities? There is no rule of Hindoo law which invalidates a conveyance or a gift *inter vivos* upon the ground of its creating a perpetuity. Then why are we to seek for some foreign law to render void a bequest contained in the Will of a Hindoo, and which is valid according to Hindoo law? Imagine what a system of law we should have to administer if we were told that it was the Hindoo law

modified by the policy and principles of English law ! If it is contrary to policy to allow the Hindoo law to prevail in its full extent, let the law be modified by the Legislature and not by the Judges. It is our duty to administer the law as we find it, not to alter the law according to our notions of policy. Even if we could do so, to what a small extent would our power be limited ! It could not extend beyond lands situate in Calcutta and suits instituted in the Supreme Court. *No rule against perpetuities is known in the Mofussil Courts or in the Sudder Court* when construing the Will of a Hindoo, and we should be introducing inextricable confusion if we were to adopt such a rule here. All this seems plain and intelligible. This matter was also considered in a case reported in 2 Hyde's Reports, pp. 94-96.

The decision alluded to by Sir B. Peacock in the judgment cited was reversed on appeal (8 Moore, I. A., p. 66). While I admit the soundness and accuracy of the above judgment of the Chief Justice, I do not assent to the following observation made by him in delivering such judgment :—"If we are to read and give effect to the Wills of Hindoos according to the light and policy of the English law, the intentions of nearly every Testator will be frustrated."

When I come to examine the clauses in this Will, I will have an opportunity of showing that such a remark is unwarranted, and that the very clauses in the present Will which the Chief Justice deems to be void according to English decisions, are plainly supported by them. In the attempt to limit the power of the Testator in this case, both the Chief Justice and Mr. Justice Norman have alluded to the English Succession Act of 1865. Nothing can be more illogical, not to say unjust. They are attempting to frame an argument founded on analogy, when the Legislature has expressly declared, by s. 331, that analogy there shall be none : the Act expressly excepts Hindoos from its operation. The late Act of 1870, which brings Hindoos under its operation, is the only Act which prevents a party granting one life estate after another ; but this Act has no application to the present case, being passed *after the decree* in

this suit. It may be as well to give here the 100th section of the Indian Succession Act :—" Where a bequest is made to a person not in existence at the time of the Testator's death, subject to a prior bequest contained in the Will, the latter bequest shall be void unless it comprises the whole of the remaining interest of the Testator in the thing bequeathed." Now there was nothing in Hindoo law, at least in Bengal, or in English law, which prevented a man from giving successive life interests, first to one Brother and next to another; and this Act, which varies,* was not passed till after the rights of the present parties had accrued, and of course could not be affected by it. I shall point out hereafter the various cases decided by the Privy Council which show that life estates may be granted in succession.

It is singular that, in discussing a question regarding a tendency to perpetuity, that Act 4 of 1837 has not attracted attention. This Act was passed shortly after the judgment in the *Martine* suit, reported in 1 Moore, I. A., p. 175.

It was passed by the Governor-General in Council, on the 17th April, 1837.

It is very short, and I will give it :—

1st. It is hereby enacted that after the 1st day of May next, it shall be lawful for any subject of Her Majesty to acquire and hold land in perpetuity, or for any term of years, property in land, or in any emoluments issuing out of land, in any part of the territories of the East India Company.

2nd. And it is hereby enacted that all rules which prescribe the manner in which such property as is aforesaid may now be acquired and held by natives of the said territories, shall extend to all persons who shall under the authority of this Act acquire or hold such property.

It seems to me quite clear that the Government, in the 2nd clause of this Regulation or Act, are referring to the General Regulations of Government, and to the right of the natives of the country to hold lands in perpetuity. Moreover, the mean-

* In India, which is still the law in England.

ing of this word perpetuity is a well-known and defined expression by English law and decided cases.

The doctrine of the Chief Justice, that the Testator could not create an estate tail according to the law of primogeniture, is singularly inconsistent with his judgment regarding perpetuity; the fallacy which pervades alike the Chief Justice's, as well as Mr. Justice Norman's judgment, arises from importing a prohibition applicable to making away landed ancestral property from Sons and Sons' Sons, as laid down in the *Mitaeshera*, into the law of Bengal, where applicability it has none. By the *Mitaeshera*, Sons are alleged to have a right vested by law, by birth, in the landed ancestral estate, which finds no support in the *Daya Bhaga*.

This is the leading point of distinction betwixt the two Schools, differing as they do in very many points regarding the order of succession. In Bengal there is no restriction on the Father's power over his property. I will examine this matter regarding creating an estate tail in my subsequent observations.

Before I proceed to the examination as to the nature of property in Calcutta, it may not be unimportant to see what has been decided by the Supreme Court and other Courts regarding landed estates either in Calcutta or the *Mofussil*.

So far back as 1785 the Supreme Court decided on a Will, by a party of the name of Wiffin, that a Will attested by two witnesses was not sufficiently executed to pass real estate in Calcutta (*Freeman v. Fairlie*, 1 Moore, I. A., p. 346).

The same principle was supported, in *Joseph v. Ronald*, by Sir Edward East and Sir A. Buller, against the opinion of Sir F. Macnaghten; Lord Lyndhurst agreeing with the majority of the Court (*see Freeman v. Fairlie*, 1 Moore, 346, 347).

In 1815 one Gabriel Vargrion, a Frenchman, devised his lands and houses in Calcutta, and the Will being duly proved, the devisees obtained them (*Freeman v. Fairlie*, 1 Moore, 241).

In 1816 dower was assigned to the Widow of an Armenian in the case of *Ewin v. Ewin* (*Ibid.* 1 Moore, I. A., 241).

In *Stephen v. Hume* (*Fulton's Reports*, 227), an Armenian Widow was decreed dower out of lands in the *Mofussil*.

In the case of Doe demise Gasper, an Armenian recovered lands in ejectment in Calcutta (*Ibid.* 1 Moore, 345).

The case of Gardner v. Fell (1 Moore, I. A., p. 299) decided that lands in the East Indies held by a tenure of the nature of fee simple did not pass by an unattested Will, but descended to the person who would be heir-at-law in England. In this case there was a commission to India.

This and the case of Freeman v. Fairlie are the leading cases on the subject.

About eighteen months previous to the decision in Freeman v. Fairlie, Jebb v. Lefevre was decided in the Supreme Court. It was the case of a Portuguese. It came before the Court in 1826, and is reported at p. 26 of Mr. Clarke's Rules of 1829. The following was the case submitted to the Court:—On the 20th July, 1824, George Rowland died intestate in Calcutta, of which place he was a native, born in wedlock of native parents of Portuguese descent. He left a Widow, Caroline Rowland, and a Son, George Rowland, an infant aged one year, both of whom were living. The Widow obtained letters of administration, and an action was brought on a promissory note of the Intestate's. Defendants pleaded that they had no goods or chattels of the Intestate, and the Plaintiff, at the time of the suit, was unable to prove any assets, except that George Rowland at the time of his death was the owner of several parcels of land and houses, *some within the town of Calcutta, and others in the neighbourhood*. Some of them had been conveyed to him by lease and release, to hold to him and his heirs, and others by instruments known in Calcutta by the name of Bengalee Bills of Sale, and which have always been treated amongst the natives of Calcutta as conveying the entire interest in lands as between the vendor and vendee, which severally contained clauses releasing to the vendors all claims from the vendor and his heirs, under which said Bills of Sale the said George Rowland obtained possession of the said lands, and was possessed thereof at the time of his death.

The parcels of lands and houses of which George Rowland was the owner were at the time of his suit in the occupation

of the Defendants, and the question reserved for argument was, whether the estate, property, or interest of George Rowland in these lands, or any of them, were assets to be administered by the Administratrix for the payment of debts. In this case there was a difference of opinion, Sir Charles Grey, the then Chief Justice, holding that the property descended to the heir-at-law, and remarking that the question in the case was not whether they were liable or not, but whether they went to the Administratrix or heir, and that if they went to the heir they might still be liable in his hands for all the debts of the ancestor, if the Charter had so provided. Sir A. Buller and Sir John Franks held that the Plaintiff was entitled to recover, and that the property in question was assets in the hands of the Defendants for the payment of debts.

This case led to the passing of what is termed Ferguson's Act, 9 Geo. IV. c. 33, which makes lands in Calcutta liable for debts.

The 6th and last clause provides that no portion of the Act is to vary the nature or tenure of land.

I now approach the celebrated case of *Freeman v. Fairlie* (1 Moore, I. A., p. 205). It was decided by Lord Lyndhurst in 1828. This case—which determined that the tenure of land in Calcutta belonging to a British subject was of the nature of freehold and real estate, and therefore did not pass by an unattested Will—underwent grave consideration. Commissions were sent to examine witnesses in India, and witnesses acquainted with the laws of India were examined in England.

The extent and nature of the rights to land, alike under the Regulations of Government and the Charter of Justice, were carefully considered.

The Master, in his Report, at p. 321, observed with reference to the Charter of the 24th of September, 1726, establishing the Mayor's Court, which recites in its preamble that the East India Company had by a strict and equal distribution of justice within the towns, forts, factories, and places belonging to them in the East Indies, very much encouraged not only His Majesty's subjects, but the subjects likewise of other Princes, and

the natives of the adjacent countries, to resort to and settle in the said towns, forts, and factories, and places, &c., and that there was great want in all the said places of a proper and competent power and authority for the more speedy and effectual administration of justice in civil cases, and for the trying and punishing of capital and other criminal offences and misdemeanors, &c.

“It seems plain, therefore,” observed the Master, “that some law, both civil and criminal, previously existed, and was in some manner administered there, which law the Charter intimates no intention of abrogating, but, on the contrary, of better carrying the same into effect; and that this could be no other than the law of England, may be clearly inferred from many clauses in the Charter, and especially from the power therein given to the Governors or President and Council of Madras, Bombay, and Fort William in Bengal, with the approbation of the Court of Directors, to make bye-laws for the Government, not only of the corporation of the mayor and aldermen thereby created at those settlements, but of the inhabitants in general, with a proviso that such bye-laws should not be contrary to the laws and statutes of England. The same observations apply to the Charter of the 8th of January, 1753, whereby the Mayor’s Court was established and their jurisdiction further regulated, and to the Charter of March 26, 1774, constituting the Supreme Court of Judicature, upon which the questions in reference are held by the Court to turn.

“Though some of the opinions in evidence before me,” observed the Master, “speak of this latter Charter only as having introduced the law of England, no provision to that effect is to be found in it, but it plainly proceeded, like the former Charters constituting the Mayor’s Court, upon the supposition that English law was already generally in force, and it made no alteration in the existing Code, except by constituting a new Court of Judicature, which it endowed singly with almost every jurisdiction, civil and criminal, legal and equitable, known to the law of England, and by regulating specially its practice in many cases. In all which points the law of England was obviously departed from, or varied, rather than originally intro-

duced. I must conclude, therefore," observed the Master, "that English law was not, as the learned Judges have supposed, brought in by the Charters; nevertheless, that the law of England, subject to the exceptions in question, and to others introduced by the Charters, ought in general to be, and practically was, the law by which British subjects were governed and their rights determined within the territories of the East India Company in Bengal, is agreed on all hands, and has been virtually recognized by Parliament, not merely by Acts which authorized and have confirmed the Charters, but by enactment in the statute 21 Geo. III. c. 70, ss. 17 and 19, the intent of which can be no otherwise explained. By that statute, entitled 'An Act to explain and amend so much of an Act made in the 13th year of the reign of his present Majesty, entitled An Act for establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe, as relates to the Administration of Justice in Bengal,' &c., it is enacted that the said Supreme Court shall have full power and authority to hear and determine, in such manner as is provided for that purpose by the said Charter of 1774, all actions and suits against all and singular the inhabitants of the city of Calcutta, provides that the inheritance and succession of lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans; and in the case of Gentoos, by the laws and usages of Gentoos; and where only one of the parties shall be a Mahomedan or Gento, by the laws and usages of the Defendant. And it is thereby further enacted, that it shall be lawful for the said Supreme Court to frame such process, and make such rules and orders for the execution thereof, in suits civil and criminal, against the natives of Bengal, Behar, and Orissa, as may accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execution of the laws and attainment of justice. Though," observed the Master, "it is not here declared by what laws the same questions shall be governed and determined when the parties, inhabi-

tants, are neither Mahomedans nor Hindoos, it seems plainly implied that the Legislature had some other laws and usages in view which were applicable, and should be applied, in the case of British subjects and others inhabiting there, and these could be no other than the laws of England, modified by force of the Charters or other local institutions."

At p. 340 he comes to the conclusion that the lots and parcels of land of which the Testatrix was possessed at the time of making her Will and Codicil, did not pass by her Will, and that the nature or kind of tenure thereof was freehold of inheritance, and that the said Testatrix was entitled to dower therein.

This finding of the Master was supported by Lord Lyndhurst, at the close of his judgment, at p. 350.

Before I examine what estate can be created by the owner of the property, I may call attention to the wonderful accordance of the judgment of Sir Charles Grey, in *Jebb v. Lefevre*, with the Report of the Master and judgment of Lord Lyndhurst. It is pretty clear that neither could have seen the judgment, or it would have been noticed.

In the case before Sir Charles Grey it was argued, that being liable for debts in the hands of an Executor or administrator, it was of the nature of personal property; but this was directly contrary to the able judgment of Sir Charles Grey, and was put at rest by the decision of Lord Lyndhurst, at pp. 349 and 350, 1 Moore, I. A. There his Lordship observed: "I confess I never myself felt the weight of that argument. Suppose an Act of Parliament were to pass similar to that which passed the last Session with reference to India. Suppose a similar Act were to pass with respect to land in England, it would render real property assets for the purpose of paying simple contract debts of the Testator and Intestate, but it would not alter the tenure of the land. The land would still descend to the heir-at-law." And a little on he remarks, "it would be a charge or liability on the real estate." Then, as to the decision itself, he observed: "I entirely agree with the Master in thinking this to be considered as freehold of inheritance or real property according to the law of England, and not as real chattel or as

personal chattel, nor is it to be considered an estate held by Pottah, subject to those Regulations mentioned in the exception, but, conformably with the finding of the Master, it is freehold of inheritance, according to the interpretation of these terms by the law of England."

The next case to which I would call attention is the case of *Mushleah v. Mushleah*, decided in February 1844 (reported at p. 42 of *Fulton's Reports*), in the Supreme Court of Calcutta. It was the case of a Jew, an inhabitant of Calcutta, who died possessed of land both *at Calcutta and in the Mofussil*.

The marginal note is: "The succession to land situated in the Mofussil, and belonging to a Jew, an inhabitant of Calcutta at the time of his death, will, in a suit in the Supreme Court, be regulated by English law; Grant, Justice, differing in opinion with the other Judges."

The case came on for hearing in *Boulnois' Reports*, and the above decision was confirmed. The Court will see that Sir John Grant, in the case in *Fulton's Reports*, was opposed to Sir L. Peel and Sir H. Seton; and, amongst other observations, Sir John Grant, at p. 430, considered that the Mahomedan law in the Mofussil applied, with certain exceptions. But such an assumption was clearly opposed to the opinion of the then Chief Justice, Sir L. Peel, and was, moreover, in direct opposition to the judgment of Sir James Colville on the rehearing of the case of *Mushleah v. Mushleah*, at p. 242 of *Boulnois' Reports*. Sir James observed: "That the effect of Lord Cornwallis's Regulation was to supersede the Mahomedan law as the law of the land in Bengal in civil suits; and I may add that such an observation is fully supported by the 15th section of Regulation 4 of 1793, which directs that in cases of succession and inheritance the Mahomedan law, with respect to Mahomedans, and the Hindoo law, with respect to Hindoos, is to be the rule for the guidance of the Judge, and also by the other clauses in the Regulations to which I have referred in a former part of my remarks."

In addition to the above cases, which refer to the tenure of land, I may cite the case in 6 *Moore, I. A.*, p. 267.

The marginal note is: "The East India Company, as representing the Crown, have a freehold in the beds of navigable rivers in India, and to the land between high and low water mark."

I may also remark that the principles laid down in *Gardner v. Fell*, and *Freeman v. Fairlie*, were supported by this tribunal, at p. 359, *Gungu Gobind Mundul v. Collector of 24 Pergunnahs* (Moore, I. A., Vol. II.). The Court observes that such cases exclude the supposition that absolute ownership of lands in private persons could not exist, and that the case before them being a case of property in the Mofussil, they were aware of nothing which could take their titles out of the operation of the principles established by such cases.

It is clear that the Court, in making such observations, must have well considered the Regulations of Government establishing the permanent Settlement.

It is pleasing to find that the principles established by such cases, especially by the well-considered judgment in *Freeman v. Fairlie*, have been supported by the Privy Council. And here I may notice a remark which fell from Sir John Grant, in the case of *Mushleah v. Mushleah*, in noticing the case of the Mayor of Lyons *v. The East India Company* (1 Moore, I. A.). He observed that Lord Brougham had remarked that the case of *Freeman v. Fairlie* only decided that an estate in lands and tenements of a British subject in Calcutta was of such a nature as to descend to his heirs according to the English law of succession, and that it was freehold of inheritance; and he added, that whatever is in that judgment beyond that point was not and could not be said to have been decided.

No doubt the observation is correct, but the investigation into the nature and tenure of land which took place in that case was absolutely necessary to determine what was the interest taken by the party in possession of land within the Presidency town. Lands in Calcutta and Bengal were both subject to the revenue laws, and it was not unimportant to see how such lands generally were held, and what was the nature of the interest which parties took under the laws and regulations of

the country ; moreover, the tenure of lands is regulated by the Charter and Letters Patent of the East India Company, which I will hereafter notice.

The principle which Lord Lyndhurst most correctly draws from the Regulations of Government applies alike to all lands in Bengal, Behar, and Orissa.

With reference to the remark of Lord Brougham, it will be seen that the case of *Gardner v. Fell*, which preceded the case of *Freeman v. Fairlie*, maintained the same principle with reference to land in the Mofussil, and the case itself applied to such lands.

The mere tenure of land, or the right of a party having full dominion over the soil to create any particular estate by Will, is a matter plainly distinct from the way in which property would descend.

If I be right in maintaining that a party having full dominion over property can create any lesser estate, it is unimportant to me whether you call it an estate tail, or under whatever denomination you may class it. Whether such an estate, if created, could be cut off by fine or recovery, is a matter essentially distinct from the power of creating a lesser interest than an absolute estate in fee simple. I own I feel somewhat surprised that the Chief Justice should venture to affirm that a Hindoo cannot create an estate tail. This seems to me a mere assumption of the point in question—a fallacy, not of the highest order, which begs the very point in dispute.

It is not necessary for me to contend that, with reference to landed estate in Bengal held by a Hindoo without the local jurisdiction, that a Testator can create an estate tail which may be cut off by fine or recovery, in the same way as an English estate held by an English subject.

What I am contending for is this, that there being no limit to his authority, as is admitted, he is entitled to give his estate in the order of primogeniture to the descendants of his Brothers, and that in so doing he is violating no law whatever. Even the Chief Justice admits (*Record*, p. 37, line 51),—"If a Testator *can disinherit his Son* by devising the whole of his

estate to a stranger, there seems to be no reason why he should not be able to devise his estate by giving particular and limited interests in the whole of the property to different persons in existence, or who may come during his lifetime to be taken in succession, as well as by giving his whole interest or bundle of rights in particular portions of land included in his estate to different persons."

According to Mr. Jarman, there is no difficulty in creating an estate tail; and here the Regulations of Government vest the landowners with full dominion over the property. He may create leases for 1,000 years, and by Act 4 of 1837 he may convey landed property in perpetuity.

Now this Act was framed just after the decision in the *Martine* case, in 1 Moore, which case established that a Frenchman domiciled in India, in the service of the East India Company, *could create a perpetuity*.

But now let me give the opinion of two Judges regarding the law of Calcutta on the introduction of the Charter of the 25th of March, 1774.

In Mr. Clarke's Rules of 1849, by *Smoult v. Ryan*, at p. 67 of the jurisdiction of the Court over the inhabitants of Calcutta under the Charter, and prior to the passing of the 21 Geo. III. c. 70, Sir Elijah Impey, the First Chief Justice, thus speaks:—"The state of the inhabitants of Calcutta was in every particular different; they were, as compared to the inhabitants of the Provinces, a very inconsiderable number, inhabiting a narrow district, and that district an English town and settlement not governed by their own laws, but by those of England, long since established, where there were no Courts of Criminal Justice but those of the King of England, which administer his laws to the extent and in the form and manner in which they were administered in England. The inhabitants had resorted to the English flag, and enjoyed the protection of the English law; they chose those laws in preference to their own; they were become accustomed to them. The town was part of the dominion of the Crown by unequivocal right; originally by cession founded on compact, after-

wards by capture and conquest. Their submission was voluntary, and if they disliked the laws they had only to cross a ditch, and were no longer subject to them. The state of a Hindoo, a native of the Provinces, inhabiting Calcutta, which in effect was an English town to all intents and purposes, did not differ from that of any other foreigner, from whatsoever country he might have migrated; he partook of the protection of the laws, and in return owed them obedience."

By the case of *Freeman v. Fairlie*, considering the observations of the Master and the judgment of Lord Lyndhurst, it seems clear that, generally, the English law was the law of Calcutta. The exemption from its operation was founded on particular exemptions.

Let me now see what was the opinion of Sir Edward H. East, who was so long Chief Justice of Calcutta, on the subject of the tenure of land in Calcutta, at p. 372 of *Freeman v. Fairlie* (1 Moore, I. A.). Sir Edward H. East, in giving judgment in *Joseph v. Ronald*, states his opinion that there was no difference in the nature or tenure of land in Calcutta, whether holden by British, Hindoo, or Mussulman subjects, than what would arise from their different laws of inheritance or succession which were preserved by Parliament to those different classes; and, he adds, the land and tenure is made subject to debts in the hands of each of them—in the hands of Hindoos and Mussulmen by their general Codes, and in the hands of the British, &c., by the terms or construction of the Charter and the Acts auxiliary to it.

It appears to me that the judgment of Sir Charles Grey in *Jebb v. Lefevre*, and the case of *Mushleah v. Mushleah*, and *Freeman v. Fairlie*, show that the law of England applies in Calcutta, except in specific cases.

But now let me see whether a Hindoo cannot create an estate tail of landed property in Calcutta. Very fortunately this identical matter has not been unnoticed by Lord Lyndhurst in the case of *Freeman v. Fairlie*. He puts the case of a conveyance of land in Calcutta by a native to a British-born subject. At p. 344, Lord Lyndhurst observes: "The next

consideration is this—If the native proprietor possessed a permanent interest in the soil, taking all the interest the native had, would the English law apply itself to that interest? In other words, would a permanent interest in land vested in a British subject, where the English law prevails, and a permanent interest in the soil gives *an entire and absolute dominion and ownership*, be governed by English law? Is it not an estate of inheritance descending to the heirs? It can hardly be denied (though in one part of the argument it was to a certain degree contradicted) that the interest of Oldham in the premises was an absolute and permanent interest, and the question made was whether it passed to one description of representatives or another? If it appears on the evidence to be an absolute ownership, what law is to be applied to it? Those who contend that it goes to the personal representatives, in a degree apply to it the English law.”

If, then, we are to apply to it the English law—if the absolute ownership of the soil is possessed by the party, and the English law is in any shape to be applied to it—the party must take a fee simple, and the property will descend to his heirs.

Suppose, in the case put by Lord Lyndhurst, the native had assigned to the Englishman an estate in tail, reserving the reversion in fee to himself, it is perfectly clear, in Lord Lyndhurst’s opinion, that such would have been a valid conveyance, and if so, it is destructive to the assertion of the Court below, that a native could not create an estate tail. The good sense of this matter is well explained by Sir John Franks in his judgment in *Jebb v. Lefevre*, at p. 74 of *Clarke’s Rules*, *Smoult v. Ryan*, edition of 1829. At the conclusion of his judgment he observes: “Upon the whole of this case, it appears to me that the British subjects are capable of acquiring estates of inheritance within the Presidency, but that the quantity of estate, or tenure of each subject, must depend upon the quantity of estate the grantor had to convey to him, and the terms of the conveyance made to the parties. Suppose Prosono Coomar had sold his whole estate to a European, was he pre-

vented by any law from doing so? If not, surely he could convey any lesser interest."

I have the more pleasure in citing the remarks of Sir John Franks, for he seems to have taken the same view as Lord Lyndhurst did eighteen months afterwards, that the descendible character of the property would not alter the tenure. This is plainly put by Lord Lyndhurst, at the close of his judgment, in *Freeman v. Fairlie*, p. 350 (1 Moore, I. A.).

There is a matter connected with the question of tenure with reference to the subject I am now examining which has not attracted sufficient attention—I mean the tenure under which the East India Company hold their possessions in India. This is alluded to by Sir Charles Grey in his judgment in the case of *Jebb v. Lefevre*, and also by Sir A. Buller, at p. 64 of Clarke's Rules of 1829. Sir A. Buller there observes: "The East India Company having been incorporated with such powers, the island of Bombay was granted to them by the Charter of 20 Charles II. It recites that such island had been ceded to the King of England, and such island was granted to the said Company, their successors and assigns, for ever, to be holden of the Crown of England, as of the Manor of Greenwich, in free and common socage, paying thereout a rent of £10 yearly; and it thereby granted that the said Company should have like powers and privileges through such other territories as they or their successors should at any time thereafter purchase or lawfully acquire in Bombay, or in any part of the East Indies."

Thus an estate in fee was granted to the Company in that island, with power to them and their successors to acquire estates of a like tenure.

The following are the clauses in the Charter and Letters Patent of the East India Company, in quarto, from 1756 to 1772, pp. 82 and 83. These clauses create the tenure in free socage. P. 94 of the same work is so important that I will give it at length:—"And we do hereby further for us, our heirs and successors, declare and grant that the said Governor and Company, and their successors, deputies, officers and assigns respectively,

shall and may have, use, exercise, execute and enjoy all and every or any of the powers, liberties, privileges and authorities hereinbefore mentioned and intended to be hereby granted in and through all and every, and such and so many ports, islands, and other territories and places whatsoever as they the said Governor and Company or their successors shall at any time hereafter purchase or lawfully acquire in or near the said ports or island of Bombay, or in any other port or places in the said East Indies within the bounds or limits of the Charter or Letters Patent before recited, in as large and ample manner, to all intents, constitutions and purposes whatsoever, as they the said Governor and Company, or their or any of their officers, deputies, agents, or assigns may or can have, use, exercise or enjoy the same in the said ports or island of Bombay, or in any part thereof, by force or virtue of these presents, or any of the powers or authorities herein contained."

It was correctly observed by Lord Kingsdown (then Mr. Pemberton), at p. 240 of 1 Moore, I. A., in the *Mayor of Lyons*, that to this day the land in Bombay is held of the Manor of Greenwich. He might have gone further, and stated that the entire lands in India were held by the Government under the above tenure. In the case of *Freeman v. Fairlie*, Lord Lyndhurst notices an objection which had been urged, that the East India Company could not grant an estate in fee; and he very truly observed, in disposing of such objection, "The East India Company was a corporation, and was capable of taking and disposing of lands in fee; it is clear therefore that, under the Charter, which was confirmed by the 5th William and Mary, they were fully entitled to do so. Considering the various Charters and the rights of Government, it can hardly be contended that the Government could not create an estate tail both in Calcutta and the Mofussil; and if a party taking under the Government has the absolute dominion over the property, he has surely a right to do so."

Is there any difficulty in creating an estate tail if a man has the absolute dominion over the property? What says Mr. Jarman, at p. 298, c. 35, 3rd edition?—"An estate tail may be

created in a Will by less formal language—indeed any expression denoting an intention to give the devisee an estate of inheritance to his or some of his lineal, but not to his collateral, heirs, which is the characteristic of an estate tail as distinguished from a fee simple. The former is transmissible to lineal descendants only; the latter, in default of lineal, devolves to collateral, and now to ascendant heirs.”

The right to create an estate tail is essentially distinct from any question whether a party can cut off the entail. There was nothing to prevent an Englishman to whom a native had granted an estate tail from cutting off the entail and acquiring the absolute fee. In my preceding remarks I have addressed myself to the general question as to what right a Zemindar or other landed proprietor has in land. The Regulations of Government seem plain on this subject.

Let me now see in what position the Government stands. Is it contended that the Government, being absolutely entitled to an estate, could not create an estate tail?

Let me look at the various cases in which grants descendible to the eldest Son according to the order of primogeniture have been supported.

In *Badhoo Hunm ut*, p. 429, 6 Moore, I. A., a Surmand of the Bombay Government to Hunmut Rao, of the 9th of April, 1823, provided that he and his Sons, and his Sons' Sons, should enjoy the villages in male line to all succeeding generations in perpetuity.

In *Syedalli's case* (7 Moore, p. 555), the Board of Revenue admitted that the grant was in Allumgah Enam; but although the Government admitted that the grants were genuine, yet they maintained such differed from a grant in Allumgah, and they conveyed the estate to the elder Brother, Kulu Moolah Khan, independently of the others. The Government admitted that a grant in Allumgah Enam was not resumable at the will of the Sovereign.

With reference to grants made either by Mahomedan or Hindoo Sovereigns, the grants were made according to the will

of the Sovereign, in some cases descendible to the eldest heir male or others, generally to the family.

Grants in Ghatwallee tenure do in effect create a tenure (call it what you like), in which the property descends to the eldest Son according to the order of primogeniture (6 Moore, I. A., p. 101).

In grants by Government of large Zemindaries, it is not uncommon to settle the same on the eldest Son according to the order of primogeniture ; and no one has ever contended that the Government has not authority to do so. Agreeing with the truth of the principle laid down in *Goherdum Bysack v. Shumchurn Bysack*, reported in the "Englishman" of the 26th of October, 1861, maintaining that the law of perpetuity could not be held to apply to Hindoo Wills, I cannot so readily admit the following remark : if we are to read and give effect to the Wills of Hindoos according to the right and policy of the English law, the intention of nearly every Testator will be frustrated.

This I have already alluded to, but the principle which the Privy Council has acted on with reference to such matters is carefully laid down by Lord Justice Turner in giving judgment, in 6 Moore, I. A., pp. 550, 551. He is observing on the construction of a Will :—"In determining such construction, the Hindoo law, no less than the English, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the Will are to be considered. They convey the expression of the Testator's wishes, but the meaning to be attached to them may be by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Among the circumstances thus to be regarded is the law of the country under which the Will is made and its dispositions are to be carried out."

In one passage of his judgment, the Chief Justice quotes Lord Wynford's remarks in *Mullick v. Mullick* (2 Knapp,

P. C. Cases, p. 247). They are as follow :—"The Hindoo law of inheritance is based on the Hindoo religion, and we must be cautious that, in administering Hindoo law, we do not, by acting upon our notions derived from English law, inadvertently wound or offend the religious feelings of those who may be affected by our decisions, or lay down principles at variance with the religion of those whose law we are administering." These principles, I admit, are not only just and true, but are highly important to be held in constant remembrance when dealing with such subjects.

It seems wholly impossible to suppose that, when the Testator might have given to his Nephew Joteendro the entire interest, he violates any principle of Hindoo law in preserving the rights of after-born children. In *Abraham v. Abraham* (9 Moore, I. A., p. 237), Lord Kingsdown notices such an event as has here taken place. He observes :—"What is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is not only loosened, but dissolved."

It could not be contended for a moment, without violating the religious feelings of the people, that the Plaintiff could perform the funeral obsequies of his parent: No Bramin in India would do so. Now who, in the absence of a Son or Son's Son, has a right to perform them? On this no doubt remains. (*Daya Bhaga*, p. 199, c. 11, s. 5, pars. 3, 212, 213; c. 11, s. 6, pars. 1 and 2. See *Dattaca Chandrica*, s. 1, par. 4, and pp. 214, 215 *Sutherland's Synopsis*.)

I now proceed to show that the interpretation of the clauses in this Will, whether founded on actual decisions or an interpretation of the clauses in the Will by Judges in England, will not defeat the intention of the Testator.

I will first bend my attention to the Will as it regards the personal estate, and afterwards will examine the disposition of the immovable property.

The Chief Justice, in p. 49 of his judgment on the Record, line 5, observes: "The words or persons are not very intelli-

gible, as the real estates were not intended to be taken jointly by several heirs, but by one person only, viz., by the heir male of the body in the elder line, and it appears to me that the words or persons must be rejected;" and he then proceeds to observe, "that it was the intention of the Testator that, when the annuities and legacies should have been fully satisfied, the corpus of the movable estate was to be held absolutely for the person who might *then be entitled* to the beneficial or absolute enjoyment of the immovable estate. *There was to be no life interest in the corpus of the personalty, and no particular or qualified estate in such corpus.* If the legacies and annuities should be fully satisfied in the lifetime of Joteendro, he was to be entitled to the absolute interest in it. He was to be entitled to alienate it; or, in the event of his not doing so, it would pass upon his death to his representatives. It was not given to the person in whom the first beneficial interest in the real estate should vest under the Will. It was to remain a matter of doubt and uncertainty, *until all the legacies and annuities should be fully satisfied, who was to be entitled to it.* It was to be held in trust for the person or persons, who *at the moment when the legacies and annuities should have been fully satisfied* or fallen in, might happen to be the person entitled to the beneficial enjoyment." And then the Chief Justice proceeds to argue that all this was a condition precedent, and only given on a contingency. The Chief Justice, in the passage I have quoted, says there was to be no life interest in the corpus of the personalty, and no particular or qualified estate in such corpus; but *this is not so.* The Chief Justice omits to notice a preceding clause in the Will, where, after directing that all his debts and legacies should be paid *within one year* from the time of his decease, the Testator says: "After paying the funeral expenses, debts, and legacies, they are to convert into Securities the personal estate, and out of the dividends and annual proceeds of the said trust money, do and shall pay the several annuities (except Rs. 1,000 for idols), and also any legacies which shall become and be payable after the trust moneys shall have been invested, so far as the interest, dividends, and annual proceeds *will suffice*

for those purposes" (and now comes the clause he omits to notice, p. 7. page 116); "*and after payment of such annuities and legacies then remaining unpaid, should pay the surplus unexpended of the said dividends and annual proceeds unto the person who for the time being shall, under the limitation and directions hereinafter expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits, or of the surplus rents thereof.*" It is utterly impossible to mistake who the party beneficially entitled is, for the surplus rents and profits are given to Joteendro by the express language of the Will. The surplus interest is here given to the person entitled. The clause regarding the idols (page 118) fixes the party beyond the possibility of dispute. Now this gift of the surplus of the personal estate corresponds with a similar bequest of the rents and profits of the real estate. And lastly comes the general direction to the Trustees, that when the legacies and annuities have been paid, they are to hold the personal estate *absolutely for Joteendro*. The entire property, real and personal, being conveyed to the Executors and Trustees, *in trust for others*, it is not possible to contend that Joteendro is not the party entitled to the beneficial interest in the real estate. Moreover, the Court below has declared that he is entitled to a life interest in the same.

It is singular, after the various decisions which have been pronounced, that such a contention should exist. Formerly it was doubted whether a devise to a person after payment of debts was not contingent until the debts were paid, but it is now well established that such a devise confers an immediately vested interest; the words of apparent postponement being considered only as creating a charge.

In addition to this, the Testator directs that all bequests and legacies shall be considered vested (*see* 1 Jarman, 3rd edition, 806; *Ibid.* Vol. II. 719). I will now quote Mr. Roper on Legacies. The editor of Fearne, Vol. I. p. 557, speaks of Mr. Roper's work on the vesting of legacies, observing that the principles of the doctrine are perspicuously laid down and fully illustrated by authorities.

Mr. Roper, in his work on Legacies, 3rd edition of 1828, at p. 493 of his first volume on the subject of legacies vesting, notwithstanding they may be given in words purporting to constitute the gifts and times of payment of them one and the same, observes :—" In the construction of Wills, the intention of Testators is the great object to be ascertained, and, when discovered, it will always prevail if agreeable to the rules of law. Hence, although the terms of bequeathing a legacy be such as if, unexplained by other parts of the Will, would prevent it from immediately vesting, yet if they be coupled with circumstances showing that a condition precedent to its vesting was not intended, but that the words importing a condition were only meant to denote the period when the legacy was to be received and enjoyed, the sense is put upon the words which the Will requires ; consequently the words of when, &c., may or may not be conditional according to circumstances. Instances of their conditional import have been given, and examples of their not being so considered now remain to be produced. There are some general rules which may be guides in these cases, one of which is, 1st. When the period of payment or enjoyment of the fund is deferred until the legatee attain twenty-one, and the first gift of it is made to him when or after he shall attain that age, but in the meantime the property is given to a *Parent, Guardian, or Trustee* for the legatee's benefit, the words ' when ' or ' after,' which import a condition precedent to the vesting of the legacy, will not be permitted to produce that effect ; on the contrary, they will be considered as merely descriptive of the time when the legatee was to be let into possession of the fund, and then, according to the rule mentioned in the first section, the interest in the legacy will vest at the death of the Testator, and if the legatee die before twenty-one, his personal representatives will be entitled to the money. The principle is this : since the whole interest in the fund is given in one way or other to and for the benefit of the legatee, it could not be the Testator's intention to make it contingent whether the legatee should have the absolute interest." Then a little on he observes :—" It is settled that, although there be no

gift of a legacy previous to the period appointed for its payment, yet if the intermediate interest be given to the legatee, or be directed to be applied for his maintenance or education, such circumstances will *primâ facie* have the effect to vest the legacy; and for this reason, as no interest could accrue to the legatee before the time appointed for payment of the principal, the Testator's intention in giving such interest must be presumed to have been to give the capital in all events to the legatee, and to have allowed him intermediate interest as a recompense for the forbearance of the capital." And here I may make a remark of my own, that the right of Joteendro to receive at the hands of the Trustees the interest and produce of the funds after payment of charges, was only *to cease when they delivered* the personal estate over to him individually under the trusts of the Will, for it is not otherwise limited as to time.

Mr. Roper, at p. 498, further observes:—"We shall now proceed to the authorities which prove that where the interest of legacies before their times of payment is not expressed to be applicable for the support of the legatees, but it or the funds are given to Parents, Guardians, or Trustees *for the benefit of the legatees generally, such bequests will vest in them at the death* of the Testator, notwithstanding the gift and times of payment of the legacies are the same, and which, without such a declaration, would have made the bequests contingent previously to the amount of the periods when they were appointed to be paid.

In the present case, not only are the parties appointed Executors and Trustees, but the Testator gives, devises, and bequeaths all his property, real and personal, to them, to hold the same upon the trusts in his said Will declared of and concerning the same, with directions to pay his funeral expenses, debts, and legacies, and giving the unexpended surplus of the income of his personal estate to Joteendro, with subsequent directions that when the legacies and annuities should have fallen in or been paid, to stand possessed of such personal estate for Joteendro.

It is abundantly clear that the Executors and Trustees took

the entire interest in the personal and immovable estate. The entire interest was absolutely vested in them as Executors and Trustees in trust for others, contradistinguished from the Plaintiff, with this further injunction, that sufficient had been given to him, and that he was to take nothing under the Will.

Independent of the clause regarding the real property where the word "estate" is used and trusts declared, in *Nicholls v. Butcher* (18 Ves. 193), the word property gives the fee simple. The entire estate is actually vested in the four Trustees in trust, to allow the Nephew (*one of them*) to receive, after charges, the surplus income of the personal estate, and when legacies and annuities should be paid, to deliver the same to him, the party beneficially interested.

The following authorities will simply bear out the observations of Mr. Roper:—

In *Hart's Trusts*, 3 De G. and J., 202 (Hawkins, 229), Turner, Lord Justice, observes:—"Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at a specified age or a present gift with a postponed payment, and if the interest is given in the meantime, it shows that a present gift was intended.—*See also Founereau and Founereau*, 3 Alk. 645 (Roper, 495); *Hoath v. Hoath*, 2 Bro. C. C. p. 4 (Roper, 495); *Walcott v. Hall*, 2 Bro. C. C. 305 (Roper, 495); *Lane v. Goodge*, 9 Ves. 225 (Roper, 496, Vol. I.), before Sir W. Grant. This was a case similar to the present, for it was a gift of the interest of the fund after charges. *Hansen v. Graham*, 6 Ves. 239–249 (Roper, 498, Vol. I.); *Branthorn v. Wilkinson*, 7 Ves. 420 (Roper, 498).

Testator gave two dock shares to the two children of his niece, when they should attain twenty-one, in equal shares, and appointed their father Trustee for them during minority.

Sir W. Grant decided they were vested upon the ground *that the Testator, in appointing a Trustee for them during minority, clearly showed his intention to postpone the possession, and not the vesting.*

Potts v. Anderson, 28 L. J. Ch. 486 (Hawkins, 229), shows that giving the interest merely subject to a charge does not vary

rule. The case of *Booth v. Booth* (4 Ves. 399) shows the disposition on the part of the Court to prevent intestacy.

There are some observations of Mr. Lewis, in his able work on Perpetuity, which will bear out the accuracy of Mr. Roper's remarks.

Lewis on Perpetuities, p. 511, remarks:—"It has been frequently observed, that the particular feature in limitations of future interest with which the rule against perpetuities is connected is the time of their vesting, or, in other words, of their becoming interests transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited as to attain this quality within the legal period of remoteness, they are free from objection in reference to the perpetuity rule."

It follows, therefore, that if the *vesting of a limitation be confined to prescribed limits*, it is not invalidated by the circumstance of its *taking effect in possession* being postponed beyond the boundary of perpetuity, for that suspension of the possessory enjoyment of the property, so far as it transgresses the boundary, will be void, and the possession accelerated by the virtual erasure of the clause of postponement from the gift. As the suspension of the actual possession is not of the essence of the gift, the allowing that to defeat it when in other respects complying with the requisites of the rule against perpetuities, would be a disregard of all principle and analogy, not more unnecessary for the preservation of the integrity of the rule than calculated to defeat the intention of the author of the gift. At p. 514 of Mr. Lewis's work I find the following summary:—"The authorities to be cited will be found for the most part, perhaps, to establish this general conclusion, that although the time is mentioned as referring to the gift itself, *unless it appears to have been fixed on by the donor at the period previously to which no part of his bounty can attach to the donee, the gift vests immediately*, and the time of payment or distribution only is postponed, not being annexed to the substance of the gift." Mr. Lewis also, at p. 515, alludes to interest being payable on a legacy as a *ground of vesting*. Although Mr. Lewis's work, from its own

merit, is fully entitled to be cited before any tribunal, it will not be unimportant to find the principle laid down by him supported by the opinion of Lord Justice Turner in *Oddie v. Brown* (4 De G. and J. 196), who observed, speaking of a legacy, "*If interest be vested, remoteness does not exist.*" In the well-known case of *Leake v. Robinson* (2 Mer. 386), Sir W. Grant observed, "When the whole interest has been given absolutely, such circumstance has always been held to furnish a strong presumption of intention to vest the capital."

The Chief Justice, at p. 206, observes, "that, in *Bagshaw v. Spencer* (Fearne's Contingent Remainders, pp. 121, 122), Lord Hardwicke, speaking of a devise, said, 'As to its being considered an executory devise, it was too remote to be good in that view, being after all *debts indefinitely should be paid, which in point of time might exceed a life or lives in being, or any other time allowed by law.*'" And a little on, p. 207, he (the Chief Justice) further remarks: "It seems clear that if this case had to be determined according to English law, the bequest *would be bad for remoteness, according to the decisions above cited.*"

The Chief Justice alludes also to *Jones v. Morgan* (1 Bro. C. C. p. 206); *Lord Dungannon v. Smith* (12 Clark and Finnelly, 546); and *Boughton v. Boughton* (1 House of Lords, 404). Before I approach the examination of the case of *Bagshaw v. Spencer*, let me clear my way by disposing of these cases.

In the case of *Boughton v. Boughton*, the Lord Chancellor, at p. 433 of the Report, observed: "There cannot, I think, be any doubt as to the construction of this gift. The parties to take are the Sons of the two Nephews who should be living when the first of them should attain twenty-five; but such Son who might first attain twenty-five might not be born till after the Testator's death, and the case would therefore fall directly within the rule as expounded by Sir William Grant in *Leake v. Robinson.*" It was a plain illegal executory devise, void on the ground that possibly it might extend beyond lives in being and twenty-one years afterwards.

In the case of *Jones v. Morgan*, a question arose whether the residuary devise over to T. and his Sons was not void as being a *tail* limitation, not to take effect till after the failure of issue of persons who took no preceding estate, but such objection was not supported; and, on the opinion of the Judges, the House of Lords ultimately found that T. was entitled to all the lands devised by the residuary clause for life, with remainder according to the limitations in the Will in tail. Lord Thurlow, in *Jones v. Morgan* (reported in 1 Bro. C. C. 206), adhered to the principle of applying the same rules to trust as to legal estates where the devise was immediate (Roberts on Wills, Vol. I. 504).

It is not possible to make such cases applying to landed estate bear any, even the remotest, analogy to the present question regarding the personal estate.

The next case the Chief Justice cites is *Lord Dungannon v. Smith* (12 Clark and Finnelly, p. 546). That was a case of personal estate.

The Testator bequeathed certain leaseholds for years in trust for his Grandson A. T. for life, and from and after his decease to permit such person who, for the time being, would take by descent as heir male of the body of A. T., to take the profits thereof until some such person shall attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators and assigns, but if no person shall live to attain the age of twenty-one years, then over.

The House of Lords held that the gift of the corpus of the estate and disposition of the intermediate rents were entirely unconnected with each other, and that the disposition of the rents and profits to particular individuals under the Will no more affected the disposition of the corpus of the estate than if it had been to mere strangers. And the Court further held, that as it was originally possible that, at the time of the death of the Grandson, the person next answering the description of heir male, under the Will, might be a minor, and might never live to acquire the estate by attaining twenty-one, and as it

would not be certain that any person would answer the description within twenty-one years after the death of the Grandson, the gifts ulterior to the Grandson's life entirely failed.

Mr. Lewis, pp. 473, 474, calls attention to the words of the Lord Chancellor. "There can" (says the Lord Chancellor) "be no question or doubt that to some extent at least this gift is void, for you might travel for centuries before a person could be found who would exactly answer the description. There might be a succession of heirs male, and yet you could not predicate of any of them that he would be the heir male who should first attain twenty-one. Thus centuries might elapse before any person was actually entitled under the description in the rule." The Lord Chancellor, at p. 623, in his judgment (12 Clark and Finnelly), explains the principle: "unless it is absolutely certain that the event must happen within the period prescribed, it is quite clear that the rule of remoteness applies, and devise is void."

The well-known case of *Procter v. Bishop of Bath* furnishes an illustration of the rule.

I now proceed to the examination of the case of *Bagshaw v. Spencer*, which appears to have been first assailed by Lord Thurlow in *Jones v. Morgan* (1 Bro. C. C. 206). His Lordship considered that the finding of the Master of the Rolls in *Bagshaw v. Spencer*, that the clause created an estate tail and was not void, was the correct finding. Mr. Fearn, moreover, in his celebrated work on *Remainders*, after examining various cases, observes, at p. 136: "It is difficult, after the last cases, to speak of *Bagshaw v. Spencer* otherwise than as an anomalous case, applicable, if at all, only to cases directly similar."

Lord Eldon, moreover, in *Jervoise v. Duke of Northumberland*, p. 572 (1 Jacob and Walker), observes: "Without going through all the cases which are well known, I may refer to Fearn's work, where he has shown that the distinction has not only been pointed out by every Chancellor who has had anything to do with these questions, but where, after pointing it out in case after case, and in every decision from first to last, and after observing on what fell from Lord Thurlow in *Jones v.*

Morgan, and in the cases of *Bagshaw v. Spencer*, and *Garth v. Baldwin*, and another case before Lord Hardwicke, and on the difficulty of reconciling them, and particularly *Bagshaw v. Spencer* with *Wright v. Pearson*, he sums up most ably *what may be said to be the text law* on this subject, and to which, as there laid down, I for one am ready to give my full assent." The learned authors of *Leading Cases in Equity*, 2nd edition of 1858, p. 19, in notes, observe, that *Jervoise v. Duke of Northumberland* clearly overrules the opinion expressed by Lord Hardwicke in *Bagshaw v. Spencer*, when he erroneously reversed the decision of Sir Joseph Jekyll, the Master of the Rolls. So much for the law of the case.

The Chief Justice apparently rests his opinion on the observation of Lord Hardwicke, that a devise like the present *would be a contingency too remote*. In his judgment, p. 205, he observes: "It was to remain a matter of doubt and uncertainty, until the legacies and annuities should be fully satisfied, who was to be entitled to it." That the passage inserted in *Bagshaw v. Spencer* which is given in the Report, was really used by Lord Hardwicke in giving judgment, I am inclined to think is correct, for reasons which I shall presently explain, but that such is an error I will undisputably prove.

In Powell on Devises, Vol. II. pp. 223, 224, 3rd edition, by Jarman, it is stated that a devise to a person after payment of debts is not contingent; and he cites the several authorities which Mr. Jarman in his work, Vol. I. p. 775, 3rd edition, also refers to.

This particular passage in *Bagshaw v. Spencer* was submitted to the opinions of Lord Eldon, then Sir John Scott, and Mr. Fearne. The following was their opinion. It will be found in the *Collectanea Juridica*, Vol. I p. 236. "We apprehend that another recovery is not necessary. We do not conceive that the case of *Bagshaw v. Spencer* furnishes any valid objection to this. In that case the principal question was whether *Bagshaw* was tenant for life or in tail. It was agreed that if he was but an equitable tenant, he was only tenant for

life. But we apprehend that Lord Hardwicke, when he decided that he was tenant for life in equity, *meant to admit that he WAS, BEFORE THE DEBTS WERE PAID, seised of the present equitable freehold*, and we do not find in that case any principle to authorize its being considered as Lord Hardwicke's opinion that he could not have suffered a valid recovery in equity with a Son of twenty-one years of age before the debts were paid because the legal fee was in the Trustees; on the other hand, we apprehend Lord Hardwicke's reasoning to be to this effect:—It being contended that he had not an equitable but legal estate, and that for that reason the limitation to the heirs of his body should be held to vest in him, Lord Hardwicke then objected to the recovery, because in that case his legal estate was an executory devise, and he intimated that it was *an executory devise too remote*; but, whether too remote or not, it was not a present legal estate, either of freehold or inheritance, and therefore the recovery would be bad. He held him to be tenant of a present equitable estate, in which case he said his recovery would not be good, because, if his estate was equitable, he did not think the words heirs of his body could enlarge it; and the case proves no more than this—that a person claiming under an executory devise of a legal estate when all debts are paid, and when the legal fee is in Trustees for that purpose, cannot suffer a recovery before the executory devise, if it is good, takes effect in possession. But the case does not prove, nor do we apprehend the Court meant, that where a person claims a present equitable estate to himself and the heirs of his body, or to himself for life or to his first Son and the heirs of his body, but which is subject to a legal devise of the fee to Trustees for the payment of debts, such person cannot, in the one case by himself, and in the other by joining with his Son, acquire the equitable fee subject to the legal fee. Bagshaw could not do so."

The opinion of Mr. Fearne was also taken (*Ibid.* Vol. I. 236). He cites various cases to show vesting before payment of debts (2 Ventris, p. 346; 1 Vernon, p. 13; and 1 Vernon, 226).

The decisive case cited by Mr. Fearne against the words

taken from *Bagshaw v. Spencer*, is the decision of the House of Lords in *Barnardiston v. Carter* (3 Bro. P. C., Tomlin's Edition, p. 64).

A., by his Will, directed his personal estate to be sold for the payment of his debts and legacies, and in case it should prove insufficient, he devised his real estate to his Executors, for the purpose of making good the deficiency. He then devised his real estate, after such time as his debts and legacies should be paid by the rents and profits thereof to E., for life; and in case E. should have male issue, then to such male issue and his heirs for ever; and after the decease of E., in case he left no male issue, then after such time as the Testator's debts and legacies were fully paid, he devised part of his said real estate to I. N., in fee. E. entered into possession, and kept down the interest on the debts, but afterwards suffered a common recovery of the whole estate, and declared the uses to himself in fee. Held, that an estate for life was vested in E. at the time of the recovery, *notwithstanding the debts were not paid, and that he could make a good tenant to the præcipe*. Held also, that the remainders to I. S. and I. N. were contingent remainders, and were barred by the recovery. Both Mr. Fearne and Sir John Scott were clearly of opinion that the expressions, if used by Lord Hardwicke, were not supportable.

That the words in the Report were actually used, seems clear from the observations of the two Counsel objecting on behalf of the purchaser (*see Collectanea Juridica*, p. 236). If really uttered, it was a clear mistake of that celebrated Judge, the real founder of British Equity. The best report of *Bagshaw v. Spencer* will be found in the *Collectanea Juridica*, in which the above opinions appear.

The passage I have quoted from Mr. Lewis shows that where the vesting is confined to the proper limits, it would not be invalidated by its taking effect in possession being postponed beyond the boundary of perpetuity.

There were two cases cited by him at pp. 512 and 513 which support his opinion—*Farmer v. Francis* (9 Moore, 310; 2 Bing. 151), and *Murray v. Addenbrooke* (4 Russell, 407).

These cases and the passage from Mr. Lewis above given appear to dispose of the cases cited, and the Chief Justice's argument on contingency. With reference to the observations of Mr. Lewis, the following clause in the Will is of the last importance. The Will states, "I direct that each of the legacies "and bequests or shares by me hereinbefore made shall be "deemed and taken to have vested in the several legatees to "whom they are by me bequeathed *immediately upon my death*, "and that in case of any of the said legatees dying after my death, "but before attaining the age at which payment is to be made "to them under the provisions herein contained, his, her, or their "legacy or share shall be payable as he, she, or they respectively "shall by Will direct, or, in case of intestacy, to the personal "representatives of such legatees or legatee, as soon as conveniently may be after his or her death."

Mr. Jarman, at p. 806 of his first volume on Wills, 3rd edition, observes: "If the Testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word '*vest*' is to be taken otherwise than in its strict legal sense, all *discussion is of course precluded*." The remarks of Mr. Jarman in his second volume, p. 719, 3rd edition, on the clause in question, are important:—"It seems that where the objects of gift in the clause in question are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on the Testator's decease, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the Testator's lifetime."

But there is another way of examining the clause in the present Will. Let me suppose even that the subsequent direction to the Trustees to hold the corpus absolutely for Joteendro, after payment of the debts, legacies, and annuities, was struck out from the Will. The Testator gives, devises, and bequeaths all his property, both real and personal, to the Trustees, and their heirs, executors, administrators, and assigns, to hold the

same on the trusts declared; and then, after directing the whole of his personal estate to be invested, he directs that, after payment of the debts, legacies, and annuities, that they are to pay the surplus unexpended of the interest, dividends, and annual proceeds unto the person or persons who shall be entitled to the beneficial enjoyment of the real estate, or of the rents or profits, *or surplus rents and profits, thereof*. It is clear that Joteendro is the person alluded to. This is distinctly fixed by the clause regarding the idols. From the passages in the Will, pp. 115 and 128, it is obvious that the Testator intended to dispose of his *whole estate*. The clause I am now alluding to, and the direction to hold *absolutely* for Joteendro on payment of the legacies and annuities, are the only clauses which dispose of the personal estate after vesting the whole of it in the Trustees. What I now maintain is this: that such clause, even if it stood *alone*, without the subsequent direction *to hold absolutely* for Joteendro, would be sufficient to pass the personal estate. (*See Roper, Vol. II. p. 419.*)

The remarks of Sir W. Grant, the Master of the Rolls, in *Adamson v. Armitage* (19 Ves. 418), bear strongly on this. He observes: "In the case of a devise of realty, words of limitation must be added to give more than an estate for life. In the case of *personalty*, words of qualification are required to restrain the extent and duration of the interest. *Primâ facie*, a gift of the produce of a fund is a gift of that fund in perpetuity, and is consequently a gift of the fund itself, unless there is something upon the face of the Will to show that such was not the intention. The same rule applies whether the income of the fund be given directly or through the intervention of Trustees, *Haig v. Swiney* (1 Sim and Stuart, 487). There is, however, an earlier case which supports this. In the case of *Phillips v. Chamberlaine* (4 Ves. 59), Sir P. Arden, Master of the Rolls, observes: "If I were to rest upon the first part of the clause only, I should apprehend that where the dividends and interest of the residue are given absolutely to the Trustee and his heirs after trust to pay the interest and dividends to A from time to time, without any limitation of duration, it would carry

the whole interest, even without the aid of the subsequent part of the clause, directing the shares to be paid at the age of twenty-one, with benefit of survivorship in case of the death of any of them before that age."

The same rule applies when there is a charge upon an estate, and where part of the fund is to be applied in payment of that charge, if the whole of the remaining interest is given to the legatee, the bequest being in fact of the whole interest subject to the charge. Thus if the bequest be to Trustees in trust out of the income to pay an annuity to A, and to apply the remaining income for the benefit of B during his minority, and when B attains twenty-one to transfer the fund to him, B takes an immediate vested interest, *Jones v. McIlwain* (1 Russell, 220).

A bequest of the interest, dividends, or annual produce of £1,000 stock to A is a gift to A of the capital sum of £1,000 stock.

The observations of Lord Justice Turner in *Addie v. Brown* (4 De G. & J. p. 194) are so pertinent, that I will give them :—

"Where funds are given to Trustees to be held by them upon trusts, direction must of course be given to the Trustees as to the time and manner in which they are to deal with the funds in favour of the person for whose benefit they are intended ; words, therefore, which in other cases might impart condition or contingency, may in such cases be used for a wholly different purpose—for the purpose, namely, of conveying the necessary directions to the Trustees."

There is another way of looking at this, which seems decisive against the intestacy regarding the personal estate which the Judges of the High Court have assumed, and that arises from the observation of the Chief Justice at p. 205—that if the legacies and annuities should be fully satisfied in the lifetime of Joteendro, he was to take an absolute interest in it. He was to be entitled to alienate it, or, in the event of his not doing so, it would pass upon his death to his representatives. The Chief Justice makes this a gift on contingency, whereas it is an interest directly vested in Joteendro, by the

terms of the Will, on the death of the Testator, which is directed to pass to Joteendro's representative at the death of Joteendro. The leading assumption fails the Court below in assuming that, with reference to the personalty, there is any intestacy at all. This is independent of the direction to deliver over the funds absolutely to Joteendro on the payment of the legacies and annuities.

Before I approach the examination of the law as applicable to the immovable estate, I may as well notice a very singular error into which the High Court has fallen, in supposing that there is no power in the Trustees and Executors to sell any portion of the personal estate after it has been invested. One would have thought that the case of *Boughton v. Boughton* (1 H. Lords C. p. 406) would have prevented the Court below from entertaining any such opinion; for in that case it was determined, that if real and personal estate be given together, subject to charges, but the real estate is not directed to be sold, the personal estate remains primarily liable.

In the case of *Tench v. Cheese* (6 D. M. & Gordon, 452), Lord Justice Turner observes: "I agree in the opinion expressed by the Lord Chancellor upon that point, that the case is, in that respect, wholly governed by *Boughton v. Boughton*, which, as I understand it, establishes this distinction—that where there is a mixed fund of real and personal estate, the mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but that, in order to effect that purpose, there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the Will. The proposition of the Court below is a most startling one. Let me examine it. It will be seen, from the Will, that the real estate is only made liable on a deficiency of the personal estate. The words are, 'Upon trust until all my debts and legacies shall have been paid, and all the annuities given by this my Will (except the 1,000 Rupees a month, for the worship of the idols)

shall have fallen in and been fully satisfied, to receive and collect the rents, issues, and profits thereof, and thereout in the first instance to pay such, if any, of the legacies and of the annuities given by this my Will *as my personal estate or the annual income derived from the trust monies and securities aforesaid shall be inadequate to defray.*' The real estate is therefore only made liable, not on a deficiency of the income alone of the trust funds, but on the personal estate or the income of the trust funds being insufficient."

The only legacy which was primarily charged on the real estate has been revoked. The only other legacy which can in any way affect the income of the real estate is the legacy to the University, p. 122.

The words are, "I desire that my Trustees do and shall, as soon as may be after my death, invest in Government Securities such a sum of money, *taken from my personal estate*, or by degrees from the income of my real estate, at the discretion of the Trustees, as will produce the monthly sum of 1,000 Rupees, and, until this is done, Trustees shall either from the proceeds of my personal estate, or from the rents and profits arising from my real property, pay 1,000 Rupees monthly." Can it be seriously contended, for a moment, that the Executors and Trustees could not act on the discretion given to them, and pay at once the legacy to the University?

The real estate cannot be sold under this Will, and the Testator directs them to pay such, if any, of the legacies and annuities as the personal estate *or the annual income derived therefrom shall be inadequate to defray.* The words come after the general direction in the early part of his Will, to pay the debts, legacies, and funeral *expenses within one year*; "in the first instance, to pay *such, if any*, of the legacies and of the said annuities given by this my Will as the personal estate or the annual income of the trust monies and securities aforesaid shall be *inadequate to pay.*" It is manifest, therefore, that the Testator looked to these securities and the annual produce and dividends as the means of paying the legacies before the rents of the real estate could be touched. The following is the con-

struction which the Chief Justice puts upon the Will, p. 213:—
 “As I understand that portion of the Will, the surplus rents of the real property, after paying the 2,500 Rupees a month, would be applied to the payment of the legacies and annuities given by the Will.”] *Such is not a construction warranted either by Boughton v. Boughton, or by Bootle v. Blundell (1 Mer. 193).* Can it be seriously contended that the Executors and Trustees have not a right to apply the personal estate in payment of the debts and legacies? The expression IF ANY in the clause I have noticed *shows distinctly* that the Testator contemplated that the greater amount of the legacies would be previously paid. Then comes the provision to which the Chief Justice alludes—“That the various legacies and annuities given by this my Will shall only be paid gradually, and as may be found possible, by my said Trustees out of the balance that shall remain after such last-mentioned payment of the said annual income of the said real property.”

This is not a clause interdicting the payment of legacies, which he directs should be paid in a due course of administration, or postponing *sine die* their payment, except where convenient for the interests of the estate; and any payment (with the exception perhaps of the University) was dependent on the contingency of the personal estate being inadequate to discharge the debts, legacies, and annuities. The clause directing the legacies and annuities to be paid gradually was in case of the estate. The various passages of the Will show this beyond doubt; for not only does he direct immediate payments to his Daughters, but in the legacies to his Daughters he directs that such should be paid as soon as conveniently may be after my decease. The large legacy of 60,000 Rupees to the descendants of Henry Mohun Tagore he directs should be paid as soon as may be after his death. The same remark applies to the grant to the University; and the Codicil granting legacies to his Great-grandchildren contains a similar clause. Now, bearing in mind the proposition of the Court below, that the corpus of the personalty could not be touched to pay the legacies and annuities, but only the interest, dividends, and produce. If

the Court hold that the real estate is only liable on a deficiency of the personal estate, as the words of the Will and decided cases plainly show, this consequence is inevitable, that the legacies and annuities never could be paid at all.

	Rs.
Legacies to Daughters to provide for .	140,000
Six Grandsons	300,000
Marriage of Son and Daughter . .	20,000
Henry Mohun Tagore	60,000
Servants	120,000
Law Professorship	240,000
Calcutta Charity and Hospital . .	20,000
Sons and Daughters of Granddaughter.	20,000
Marriage	10,000
Building	35,000
	<hr/>
	965,000
	<hr/>

Such being the amount of the legacies and annuities to be provided for, let me suppose, for the sake of argument, that the personal estate amounted to five lacs of Rupees. I will take the interest without deductions as amounting to 25,000 Rupees. Striking off, for the sake of conciseness, the 65,000, there will remain 900,000 Rupees, the interest of which is 45,000 Rupees. It is, therefore, manifest, if the Executors cannot touch the personal estate, that the legacies and annuities, even assisted by the rents of the real estate, will be postponed for a long period, whereas if the personal estate was applied, three or four years would be amply sufficient to discharge them.

In this case, the Testator has given no permission to sell or mortgage the corpus of the real estate, and has, moreover, positively directed, except in one particular instance, that the rents and profits of the real estate are only to be liable on a deficiency of the personal estate or the income thereof to pay the debts, legacies, and annuities. The reason given by the Chief Justice, at the close of his judgment, for directing the costs of the suit to be paid out of the surplus rents and profits of the immovable

estate is so singular, that I will give it:—"The legatees and annuitants are not parties to this suit, and consequently the costs ought not to come out of the interest of the movable estate, or of the dividends and interests thereof, which form the first fund applicable to the payment of debts, legacies, and annuities." This is a singular reason for setting aside the positive and clear directions of the Testator. With the intention of the Testator so clearly expressed, a Court would have no hesitation in applying the principles laid down by that great Judge, Lord Eldon, in the case of *Bootle v. Blundell* (1 Mer. 220-230), where he observes: "I take it to be certain that it is not enough for the Testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts, that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then it comes to this, upon each particular case, as it arises, the question will be, Does there appear from the whole testamentary disposition, taken together, an intention on the part of the Testator, so expressed as to convince a judicial mind, that it was meant not merely to charge the real estate, but so to charge as to exempt the personal?"

This case is much stronger, for here the real estate is only to be liable on the deficiency of the personal estate.

I now approach the examination of the disposition of the real estate. The Chief Justice, at p. 186, observes: "That the Plaintiff, as heir-at-law, is entitled (not under the Will, but notwithstanding the Will) to a general estate of inheritance in reversion in the immovable property of the Testator, and that by the terms of the Will *no estate larger than an estate for life has been validly created*, and that there is a resulting trust for the Plaintiff." This is not more singular than the remark at p. 193, that he did not intend to disinherit his Son under all circumstances, and that the Will contains no devise of the ultimate reversion after the determination of the estates which were intended to be created. Before citing the various cases which negative any constructive

trust for the heir, it may be as well for me to show more minutely the interest which the Executors and Trustees take under the Will.

The direction to pay debts and legacies, coupled with the grant of the whole property, real and personal, to the Executors and Trustees, along with the subsequent direction to convey, would vest the fee simple in them, *Doe d. Edlin* (4 Ad. & Ell. 582); *Doe v. Field* (2 Barn. & Adol. 564).

The Will, p. 124, gives to Joteendro the house, library, and real estate for life, with reversion in tail male to the Son of Joteendro, born or adopted after his (the Testator's) death; and he then limits the estate on failure of such to his other Nephews and the descendants of his Brothers in tail male according to the order of primogeniture. He gives to Shorendro, the Brother of Joteendro, a life interest in the property, in the event of the death of Joteendro (without leaving or adopting a Son). And now with reference to the remark of the Chief Justice, that he saw no absolute intention to cut off his Son entirely, I say that the limiting estates tail to the descendants of his Brothers did, at least to that extent, show an intention to disinherit him. There are two cases which I may refer to, *Doe v. Garrod* (2 Barn. & Adol. 87), and *Cole v. Goldsworth*, p. 209 (2 Marsh, 517).

In the opinion, therefore, of Chief Justice Gibbs and Lord Tenterden, these cases were considered decisive, as showing that it was the Testator's evident intent that his Son should not take while any of his Brother's children or their descendants existed. It is pretty clear, therefore, if such limitations are valid, that for a very long time the heir-at-law would be disinherited; but the Will does not stop there. The Chief Justice says there is no bequest of the reversion after the intended estates tail. Let me see how far such an observation is correct. At p. 117, the Testator, after stating that he had given and devised his real estate to parties named by him, observes: "I desire that my said Trustees or Trustee shall hold the *real estate generally* for the use and benefit of such last-named person or persons for the time being, so far as is consistent with the trusts and

provisions of this my Will created and contained." It is apparent also that, by the early clause in the Testator's Will, he vests the absolute fee simple in the Executors and Trustees for the payment of debts, &c., and on the trusts of the Will, declaring, a few lines back, that he had given what he thought sufficient to his Son, and that he was to take nothing under his Will or the trusts thereof; and in the passages of the said Will to which I have referred, it is clear that the Testator intended to dispose of his whole estate.

In the clause above stated, he directs for whom they were to hold it. Now, the Testator has given not only the surplus income of his personal estate to Joteendro after the charges, but he has also directed the Executors and Trustees to pay the residue of the rents and profits which shall from time to time remain unexpended to the person or persons to whom he had *devised the real estate*. That such person was Joteendro is distinctly fixed by the Testator himself at p. 117, s. 10, and p. 118, s. 13.

I will now proceed to the cases which will show that, under such a devise, even by English law, no resulting trust can arise for the heir-at-law. I quoted and observed upon the following cases:—*Maundy v. Maundy* (2 Strange's Reports, p. 1,020); *Hill v. Bishop of Lincoln* (1 Atk. 619, 620); *King v. Denison* (1 Vesey & Beumes, 272; Jarman, Vol. I. 530, 3rd edition); *Challenger v. Sheppard* (8 T. R. 597); *Knight v. Selby* (3 Manning & Grainger, p. 93); *Moore v. Cleghorn*, 7th July, 1848 (12 Jurist, 591); and *Smith v. Smith* (31 L. J. 1861).

I commented on and explained the above cases, but as I have carefully examined them in my remarks on the judgment of the Privy Council, it is unnecessary to repeat such here.

It is clear from the Will that the Testator deemed the amount given sufficient for his Son, but he also adds a direction that he is to take nothing, having specifically given the entire estate in trust for the benefit of others.

We all know that, by English law, mere negative words will not exclude the heir from property undisposed of, but the clause

to which I have alluded shows a general intention to give the entire estate for the benefit of others, and, under the authority of the preceding cases, distinctly negatives any resulting trust.

I also alluded to two other authorities—*Sidney v. Shelley*, (19 Vesey, 352), and *Hughes v. Evans* (13 Simon's Reports, p. 496). Both of these cases are examined in my observations on the judgment of the Privy Council.

I now approach the law regarding Religion. Before entering on this matter, I may as well see what the Privy Council have laid down regarding the construction of Wills. In 6 Moore, I. A., p. 551, the Court observe the question depends on the construction of the Will. In determining that construction, we must look to the intention of the Testator. The Hindoo law, no less than the English, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, as far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the Will are to be considered: they convey the expression of the Testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances; and where this is the case, those circumstances, no doubt, must be regarded. Among the circumstances thus to be regarded is the law of the country under which the Will is made and its dispositions are to be carried out. I find, also, in 7 Moore, I. A., p. 64, the same principle is applied. Lord Justice Turner, in giving the Court's decision, observed: "In considering the validity of instruments of this nature (a Deed of Adoption), it is of great importance, in the first place, to ascertain of the parties at the time when the instruments are alleged to have come into existence, *and the motives which may have led to the execution of them.*"

Taking such principles for one's guide, I will now consider the existing laws regarding change of religion. I will endeavour to examine the matter with fairness and moderation. The first Regulation is 4 of 1793, s. 15. It enacts that, in suits regarding succession, inheritance, marriage, and caste, and all

religious usages and institutions, the Mahomedan law with respect to Mahomedans, and the Hindoo law with regard to Hindoos, are to be considered as the general rules by which the Judges are to form their decisions. In the respective cases, the Mahomedan and Hindoo Law Officers of the Court are to attend and expound the law. This was modified by Regulation 8 of 1795, which enacted that, in suits regarding succession, inheritance, marriage, and caste, or other religious usages and institutions, the Mahomedan laws with regard to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to regulate their decisions, and that in causes in which the Plaintiff shall be of a different persuasion from the Defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans, or other persons not being either Mahomedans or Hindoos, shall be Defendants, in which case the law of the Plaintiff is to be made the rule of the decision in all plaints and actions of a civil nature. The above was altered and rescinded by Regulation 7 of 1832, s. 8, and the provisions contained in s. 15 of Regulation 4 of 1793, and the corresponding enactment in clause 1 of Regulation 3 of 1803, s. 16, were to be made the guidance of the Courts in all cases. The 9th section of this Act 7 of 1832 contains so important a clause, that I will give it:—"It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bonâ fide* professors of those religions at the time of the application of the law to the case, and were designed for the protection of *the rights of such persons, not for the deprivation of the rights of others*. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, or where one or more of the parties to the suit shall not be of either of the Mahomedan or Hindoo persuasion, the laws of those religions shall not be permitted to operate to deprive such *party or parties of any property to which but for the operation of such laws they would have been entitled*. In all such cases the decision shall be governed by the principle of justice, equity, and good con-

science; it being clearly understood, however, that this provision *shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by such principles.*"

I now approach Act 21 of 1850. The preamble states it to be "An Act for extending the Principle of Section 9 of Regulation 7 of 1832 of the Bengal Code throughout the Territories subject to the East India Company (passed 17th April, 1850)." Whenever, in any civil suit, the parties to such suit may be of different persuasions, when one party may be a Hindoo and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Hindoo or Mahomedan persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property which but for the operation of those laws they would have been entitled, and it will be beneficial to extend the principle of such enactment throughout the territories subject to the Government of the East India Company. It is enacted as follows:—1st. "*So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company established by Royal Charter within the said territories.*"

I think I need not argue at any length that neither the former Regulation nor the Act 21 of 1850, had any intention to take away the right of a Testator in Bengal to dispose of his property, ancestral and self-acquired, by Will. The 9th section precludes such a construction, for the Legislature observe that the Act was intended to protect rights, but not to deprive others of their rights. The Legislature, by Act 21 of 1850, moreover, do not entirely repeal the law. The expression is, that *so much of such law as inflicts forfeiture of property by reason of his renouncing or being excluded, shall cease to*

be enforced as law. If it were successfully contended that this Act 21 of 1850 prevented a Testator from giving away property from his Son, every legacy in the present Will would be void. The forfeiture to which the Legislature alludes is of some legal right. Whatever questions may arise under the law of the Mitacshera, Bengal stands clear from them. For, as I have already mentioned, Sons have no vested right by the law of Bengal; and that doctrine of the Mitacshera, that Sons have by birth a vested right in real property, is distinctly opposed to the Daya Bhaga and the various judicial decisions I have noticed. This is plainly laid down at c. 1, par. 19, p. 9, and c. 1, par. 26, p. 11 of the Daya Bhaga, and is the leading point of distinction between the two Schools. The object of the Act 21 of 1850 is plainly and accurately explained by Mr. Sconce in the case of *Rajecoonwawee Dossee v. Golahee Dossee*, reported at p. 1,891 S. D. A., 1858. At p. 1,897 Mr. Sconce observes: "That Act 21 of 1850 was passed, as I take it, wholly in the cause of religious toleration; and that it was impossible," as he thought, "to direct its application to a purpose foreign to its object, or to suffer it to subvert another law to which it contained no allusion."

Taking for granted, for the sake of argument, that if there had been no Will the Plaintiff would succeed, the law, as declared by the Bengal Code of the 7th of 1832, is not interfered with, but the provision of the 21st of 1850 extends the principle to all the territories of the East India Company.

I own being surprised at the Chief Justice's observing, at p. 193, "that he saw no general intention *to disinherit his Son*." I think that, even from the circumstances I have alluded to, ample intention to disinherit is shown. In addition to this, the Testator gives the beneficial interest in the property for life to the Son of his Brother, who is the proper person to perform the funeral rights. The Brother's Son, Joteendro, would have been the proper person to adopt under the circumstances which have occurred. The Son, moreover, was *clearly not to take till the entire line of the BROTHER'S*

CHILDREN was extinct; and this is independent of the general residuary clause, directing the Trustees and Executors to hold the real estate for the benefit of the party entitled to the beneficial interest in the real estate. Looking at the provision he had made for his Son in his lifetime, and which he deems sufficient for him, and closing all this with a direction to the Trustees that his Son was to take nothing, it seems absolutely impossible for any one successfully to contend that he has not absolutely disinherited him. The opinions of Chief Justice Gibbs and Lord Tenterden in the two cases I have alluded to, of *Doe v. Garrod* (2 Barn. & Adol. p. 87), and *Cole v. Goldsmith*, p. 209 (2 Marshal's Reports, p. 517), seem strongly to support the above view.

Looking at the principles laid down by Lord Justice Turner in the case I have cited, no one can reasonably doubt why he gave the property away from his own line. He was not prevented by any law from following the dictates of his own religion, in disposing of his own property. Moreover, it is clear he had quarrelled with his Son. Lord Kingsdown, considering the case with regard to the relationship between the parties, asks, What is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as *an outcaste*—the tie which bound the family together, so far as he is concerned, not only loosened, but dissolved (*Abraham v. Abraham*, 9 Moore, p. 237). From the Chief Justice's remarks at p. 175, he appears to consider that the Testator, by doing what he had done, might deprive himself of some imaginary advantages, and that he is infringing Hindoo law. All this is purely idle. By the law of Bengal, the Testator can break the whole line of descent, and give the property to a perfect stranger. What is there in the law to prevent him from giving the property to these parties and their children? In one case (*Dutt v. Kemhiah Sing*, 3 S. D. A., p. 144), it was held, that the adoption of any other individual while a Brother's Son exists, was void. This strictness would not now, perhaps, be held; but the propriety of adopting a Brother's

Son cannot be doubted. This is clear from s. 1, pars. 20 and 21, p. 161, and s. 2, par. 28, p. 33, Sutherland's Translations of the Treatises on Adoption, p. 214. The words are: "The right of a Brother's Son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a rule of law." In the present case, the Testator, no doubt, would have adopted Jotecndro, being his favourite Nephew, if he could have done so; but, having passed the prescribed age, he could not do so. He settles, however, the property on his Brother's children according to the law of primogeniture. The Nephew, also, is the proper party to perform the funeral obsequies (6 S. D. A., p. 271, and Daya Bhaga, c. 11, s. 6, par. 2, pp. 212, 213). It is not a little singular, that when the Chief Justice has affirmed so positively that a man cannot create an estate, descendible according to the law of primogeniture, he has forgotten to examine the leading case on the subject. What the Chief Justice declares impossible was actually done in 1 S. D. A. Reports, p. 2. There a Hindoo Zemindar made his Will by a Deed, and settled his Zemindary on the eldest of the four surviving Sons.

But Regulation 7 of 1832, which applies to Bengal, has not been altered, and the Act 21 of 1850 merely extends the principle throughout the territories of the East India Company. The last Act does not entirely repeal the Hindoo law on the subject, but only, as I have said, *so much as may affect* any existing right. Under the Regulation 7 of 1832, the Courts, moreover, are precluded from applying to cases similar to the present the English law of perpetuity; and Act 21 of 1850 was clearly not intended to make on so important a matter any difference in the law. The observations of the Chief Justice in Goberdhone Bysack v. Shamchurn Bysack, already given, were in perfect unison with the positive directions of the law as laid down in Act 7 of 1832. In that case, the Chief Justice determined that the validity of the gift must be determined by Hindoo law, and that if such law contained no rule against perpetuities, a devise would not be invalid because

it intended to create a perpetuity. The clause in Regulation 7 of 1832 shows that the Court, so far as the Mofussil was concerned, was not warranted in applying the English law of perpetuity. The present case, connected as it is with the religious feelings and institutions of the people, seems directly *within the prohibition* alluded to. The case of Sonatun Bysack v. Juggut Soondera Dossee (8 Moore, p. 66) was appealed to the Privy Council, and the judgment of the Court below was reversed. In this case, the Court actually decreed a perpetuity. Such a decree is in direct opposition to what the Chief Justice and Mr. Justice Norman have contended.

The High Court having refused to declare the right of one Brother to succeed to the estate after another on the ground of Lady Langdale's case, one naturally turns to see whether there are any cases in the Privy Council where such rights have been declared. I then examined the following cases:—Soorgemoney v. Denobundo Mullick (6 Moore, I. A., p. 526; 8 Moore, p. 87; 9 Moore, p. 123); Prawnkisto v. Bamasoonderee (9 Sutherland's Weekly Report, p. 1, at end; and 4 Moore, I. A., p. 137). As I have carefully examined the above cases in my remarks on the judgment of the Privy Council, I need not repeat them here.

The fallacy which runs through the entire judgment of the Chief Justice and Mr. Justice Norman consists in supposing that the authority of a Testator, in disposing of his estate, whether ancestral or self-acquired, is limited, like the authority over land, according to the Mitacshera. There are expressions regarding a Testator not being authorized to vary the line of descent which partake of the same fallacy, and are plainly refuted by the cases I have alluded to. These cases show that, according to the Daya Bhaga, females are not so strictly excluded as by the Mitacshera. In a family where there are three Brothers, if one die leaving a Widow and no male issue, the Widow is heir by the law of Bengal; whereas, by the law of the Mitacshera, in the teeth of the various texts I have given, she would only take maintenance.

The above cases support the right of Shorendro and his

Son to a life interest in the real estate after the death of Joteendro without male issue or adoption. The bequest to Shorendro was a simple contingency, given in the event of Joteendro dying without male issue. Nothing in English or Hindoo law, as applicable to Bengal, can affect the validity of such a devise. This cannot be mixed up with a question of making an estate tail. A Hindoo in Bengal may surely give his property to four persons with benefit of survivorship. Even by English law, if the contingency does not happen or cannot take effect, the subsequent bequest will not fail.

I now approach some remarks of Mr. Justice Norman. He appears to consider that the words "heirs male of the body" are used in an artificial sense, for the purpose of indicating persons who are not heirs, but persons selected by the Testator from among the heirs who are to take in succession, by special limitation or special substitution, or, if any one prefers that term, each in his turn as a purchaser. Persons taking under such special substitution do not take estates of inheritance.

The intention, observes Mr. Justice Norman, is plainly to give to each in succession no more than an estate for his own life. They are to have no power of disposition, p. 234. The passage in the Will alludes to a Son of Joteendro born or adopted by him after the Testator's death. It will be found, p. 125, as follows:—"To the use of each of the Sons of the said Joteendro Mohun who shall be born after my death successively, according to their respective seniorities, and the 'heirs male of their respective bodies' issuing, so that the elder of such Sons and the heirs male of his body may be preferred to and take before the younger of such Sons, and the heirs male of their and his respective bodies issuing." Mr. Justice Norman goes on to observe: "If the Testator has given a succession of estates for life, we cannot construe the gift as a gift of the inheritance, because it cannot take effect as the Testator intended. We

certainly should not be carrying out the intention of the Testator, as expressed in his Will, if we treated the first unborn Son of Joteendro who should come into existence as intended by the Testator to take an estate of inheritance." Now, though the Chief Justice and Mr. Justice Norman agree that an estate cannot be given to an unborn Son, yet the former considers that the words "heirs male of the body" were clearly used as words of limitation, and were clearly intended to create an estate tail. In the present case, the Testator has clearly used technical expressions, *and in one part of his Will expressly alludes to the estate IN TAIL he has given* (p. 182).

There are some observations which fell from Lord Kingsdown in *Towns v. Wentworth* (11 Moore, P. C. C. p. 526), which are so important, that I will give them:—

"In order to determine the meaning of a Will, the Court must read the language of the Testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification—that when the rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the Testator has by his Will excluded beyond all doubt such construction. When the main purpose and intention of the Testator are ascertained to the satisfaction of the Court, if particular expressions are found in the Will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention *which the law will not permit* to take effect, such expressions must be discarded or modified; and, on the other hand, if the Will shows that the Testator *must necessarily have intended an interest to be given* which there are no words in the Will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the Testator so as to carry into effect as far as possible the intention which it is of opinion that the Testator has on the whole Will sufficiently declared."

In addition to the above, the observations of Mr. Justice

Norman seem absolutely disposed of by the remarks of the Chief Justice of the Queen's Bench (Sir A. Cockburn), in *Jordan v. Adams*, 9 C. B., N. S., 497.

The words are remarkable:—"I take the effect of the authorities on this subject clearly to be, that when land is devised to a man for life, *with remainder to his heirs or the heirs of his body*, no incident superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to his heirs, however plainly inconsistent with an estate of inheritance, nor any declaration, however express or emphatic, of the devisor, can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs or the heirs of his body, the law inexorably converts the entire devise in favour of the ancestor."

Mr. Justice Norman appears to consider the case of *Seaward v. Willock* (5 East's Reports, p. 198) as similar to the present. In that case there was a devise to A for life, and after him to his eldest or any other Son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies, *down to the tenth generation*, during their natural lives. A having become bankrupt, the property was sold by the assignees, and upon an action by purchaser for return of deposit on the ground of a good title to the fee simple not being deduced, it was contended on the part of A that he took an estate tail in order to effectuate the general intention that the property should be inherited in succession by his male issue. But it was held that the estate of A could not be enlarged, as there was no general intent to give a *descendible estate to the issue of the first devisee*, but a single intent to create a succession of estates for life not warranted by law. The case has this peculiarity, that throughout the judgment it was treated as clear that if the first taker had only an estate for life, all his Sons except one, and the issue of all such Sons, would be excluded.

The limitations in this case were held void on the ground of remoteness.

It is abundantly evident that this case is in no degree opposed to the present. The case of *Seaward v. Willock* shows that the Testator clearly did not intend to create an estate descendible according to the doctrine of primogeniture to the Sons of A.

Mr. Fearne also, at p. 267, edition of 1844, Vol. II., in contrasting the case of *Seaward v. Willock* with other cases, observes that the restrictive words, "down to the tenth generation," plainly distinguish it from others, and negative the existence of any primary or paramount intent to admit all the descendants.

In this case it is quite clear that the Testator intended to give an estate tail to the after-born Son of Joteendro, if he should have one, without any limitation to its descendible character according to the law of primogeniture. If we are trying this according to English law, nothing prevents such a limitation.

Throughout the whole of the judgment of the High Court there runs this assumption, that we are violating the Hindoo law in bequeathing the property to descendants of the Testator's Brother, who under the circumstances of the case would be the proper persons to inherit and perform the funeral rites. No law limiting the authority of a Testator in Bengal can be shown. The *Daya Bhaga* supports the disposition. A long line of authorities establish a Testator's right in Bengal to leave his property to whom he pleases. The solemn decision of the Judges of the Sudder and Supreme Court, in 1832, support his right. Repeated decisions of this tribunal have sanctioned the principles supported by them. Yet now it is to be contended that all this is wrong, and that the practice of not one hundred years, but four hundred years, is to be annulled and set aside.

With reference to the limitation by English law to an unborn Son of Joteendro, it may be as well to cite Mr. Fearne on the subject (*see* Fearne, Vol. I. p. 502, edition 1844, cited by Mr. Lewis on Perpetuities, at p. 412), where he observes: "Any

limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation, as in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards to the children of such unborn children, this LAST REMAINDER is absolutely void."

Mr. Jarman also, in his book on Wills, 3rd edition of 1861, p. 261, observes: "If the objects of a future gift are within the time prescribed by the rule against perpetuities, of course it is immaterial what is the nature of the interest which such gift confers. It would be very absurd that persons should be compelled to take an estate in fee, in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary and terminable interest (for the larger includes the less), and yet it would not be difficult to cite dicta, and even adduce a decision propounding the doctrine, that a life interest cannot be given to an unborn person. The fallacy has probably arisen from the terms in which the general rule has been ordinarily laid down, namely, that you cannot give an estate for life to an unborn person, with remainder to his issue, which has been read as two distinct propositions; the one affirming the invalidity of a limitation for life to an unborn person, and the other the invalidity of a limitation to the issue; though, in fact, all that is meant to be averred is, that a limitation to the children or issue of an unborn person (following a gift to such unborn person) is bad, as it clearly is, since children or issue may not come *in esse* until more than twenty-one years after a life in being. Taken as two separate propositions, the rule is not true in either of its branches, for a remainder of a legal estate immediately expectant on a vested estate of freehold may be limited not only to an unborn person, child of a living person, but to *any unborn person whatever, since, in order to take, such unborn person must, as we have seen, come in esse during the subsistence of the person's estate; that is, of the vested estate for life, or in tail, otherwise the contingent remainder to him will fail.*"

From the remarks of Mr. Justice Norman, in his judgment, it would appear that he considers that the various clauses in the Will restricting the parties from cutting off the entail would bring the case (trying it by English law) within the principle laid down in *Seaward v. Willock*; but this is a clear error. The only effect that such restrictions can have, according to English law, is not to destroy the estate itself, but simply to render the restrictions themselves absolutely void. The matter has been long conclusively settled, and the authorities are all collected in *Hargrave and Butler's Notes Co. Lit. Vol. III., Warrantee, s. 379, C Note 330, edition 1794.*

The Chief Justice is not very happy in observing (p. 197): "In like manner, according to the common law of England, a grant could not be made to a person not *in esse* at the time of the grant (*Comyn's Digest*, tit. Grant, B. 1). It is there said, every person *in esse* at the time may take by grant. But a person not *in esse* at the time of the grant cannot be a grantee, as if a grant to the right heirs of B, who is then alike."

The Chief Justice further observes: "I do not cite these cases for the purpose of showing what the Hindoo law is upon the subjects of grants to uncertain persons, or to persons not in existence, but merely for the purpose of showing that there is nothing contrary to reason or common sense in the Hindoo law, as I read it." I don't see why the Chief Justice should go back to the common law of former days, for the power of testamentary disposition of real estate, according to Mr. Lewis on *Perpetuities*, p. 16, was for the first time allowed by the Statute of Wills, explained by 34 Henry VIII. c. 5.

For what purpose is such introduced? For the purpose of showing that the view he takes of the Hindoo law is not opposed to reason and common sense, that an estate cannot be given to a party not in existence; but, on this point, the proposition of the Court below is expressly contradicted even by the *Mitacshera*, at p. 257 of the quarto edition, where the author negatives the power of the Father over the immovable

estate in the following words :—"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should therefore be made." This, when duly attended to, is literally decisive on the subject. Instead of quoting a rule of the common law which has no application to a Will, it is surely not unimportant to see whether Hindoos in Bengal have less rights in disposing of their property than British-born subjects. The law in England limits the right of the last in tying up property to lives in being, and twenty-one years afterwards. Surely a Hindoo in Bengal, under the authorities, has not a less right than an English-born subject. It is perfectly clear, from English authorities, that a man having an estate may give such estate to a Father for life, and afterwards to his unborn Son in tail or in fee.

Mr. Lewis puts this matter in the same way as Mr. Fearne. At p. 423 of his work on Perpetuities he observes: "Life estates may also be given successively to the unborn children of a person *in esse*, if the interests of the successive remainder men are limited to vest on their attainment of their ages of twenty-one years, as such event must necessarily happen within twenty-one years after a life in being; and, by consequence, an ultimate remainder may also be limited expectant upon such life estates, provided it be either presently vested or will necessarily vest within the proper period; *e.g.*, a remainder to the unborn child of any other person *in esse*."

Amid the numerous singular statements to be found in the present judgment, one statement is most extraordinary, and that is, "that, with reference to Hindoos, there is no express provision for trusts" (p. 196). And such expression is repeated by Mr. Justice Norman at p. 229. But such an assumption is entirely erroneous, for, by the Regulation of Government, 5 of 1799, s. 2, the Executors in Bengal, Behar, and Orissa are especially directed to carry out the trusts of the Will. In addition to this, Jaganatha's Digest is filled with instances of trusts.

A very singular admission falls from Mr. Justice Norman at p. 232: "We have not been referred to a single case in

which a devise by a Hindoo to an unborn person has been held good." Now, it is perfectly clear that no argument could have taken place on the point before the Court. It would almost appear that the Chief Justice had become aware, at the time of writing the reasons of his judgment, that some difficulty would arise on their finding, where he observes, p. 196: "I exclude from these remarks a posthumous child of the Testator, and a Son adopted by a Widow of the Testator after the death of her husband. These cases *depend upon particular law*, and do not extend to posthumous Sons of strangers, or to Sons of strangers adopted by Widows after their death. I do not, therefore, intend to exclude from the general remarks Sons of Joteendro, &c., to be born or adopted after the death of the Testator, whether adopted in Joteendro Mohun's lifetime, or after his death." The proposition of the Judges in the Court below is, that property cannot be given to a person who is not in existence at the time of the gift. Let me examine this. When a man gives authority in writing to his Widow to adopt a Son, it is in fact a gift to such adopted Son of the whole of his property, which is not rendered void by there being no Son in existence at the time of authority given. The letting loose the bull at the funeral, in the Note to the Daya Bhaga, at p. 10, c. 1, p. 21, and the injunction in the Mitacshera to protect the property of the unborn, explain the meaning of the expression *sentient being*, as used by Jimuta Vahana. It is clear that a gift on a contingency is good according to Hindoo law. It is equally clear that, according to the decisions of the Privy Council, a gift, to take effect on an event which may happen at the close of a life in being, is good. The two cases reported in 9 Moore, I. A., p. 123, and 4 Moore, I. A., 137, seem directly in point on this head. The other cases of gifts after the death of parties to others which I have given, are equally opposed to the doctrine contended for by the Chief Justice and Mr. Justice Norman.

In the case of Sonatun Bysack v. Juggutsoonderee Dossee (8 Moore, I. A., p. 87), the Privy Council held the trust good

for unborn children. The Chief Justice, when alluding to a posthumous child and an adoption by a Widow, observes, "*these cases depend upon particular law.*" There is a fallacy lurking under this expression which I will point out. The right of a Father to will away his own property in Bengal is the general law of the land, unlimited by any authority, and this has been expressly recognized by the Privy Council in various decisions.

The case having been heard, afterwards on the 24th of February, 1872, the Right Honorable the Lords of the Judicial Committee ordered the case to stand over, directing Rugghe-nundum Tagore, as guardian *ad litem* of the infant Surrut Chunder Tagore, to enter an appearance on behalf of the said infant, and to come prepared to be heard by Counsel on the 1st day of June, 1872, in default whereof their Lordships will proceed to repeat their opinion on the said consolidated appeals and cross appeals *ex parte*, as regards the interests of the said Surrut Chunder Tagore, and that such order should be personally served on the said guardian of the said infant, and that proceedings in the meantime be suspended.

That the said order was duly served on the said guardian, who refused and omitted to appear according to the directions of the said order. That afterwards, on the 5th day of July, 1872, the following decree was pronounced by the said Judicial Committee of the Privy Council:—

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Juttendromohun Tagore and another v. Ganendromohun Tagore, and Cross Appeal from the High Court of Judicature at Calcutta ; delivered 5th July, 1872.

Present: Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, Mr. Justice Willes, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel, assessor.

These were consolidated cross appeals from a decree of the

High Court of Judicature in Bengal (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honorable Prosonocoomar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th of August, 1868, leaving his only Son, the Plaintiff, and two widow Daughters, with six Grandchildren, the children of Daughters him surviving.

The Defendants are three of the Trustees and Executors under the Will of Prosonocoomar, dated the 10th of October, 1862, together with the persons in existence who claim a beneficial interest under the Will, other than legacies and annuities (which are not disputed). The Trustees and Executors are Opendromohun Tagore, Juttendromohun Tagore, and Door-gapersaud Mookerjee.

Juttendromohun Tagore is named as the first tenant for life, and he had, and has, no Son.

The Defendant Sourendromohun Tagore (named in the Will Shooshendromohun Tagore) is also named as tenant for life.

The Defendant Promodecoomar Tagore (a minor) is the Son of Sourendromohun Tagore, and was born in the lifetime of the Testator. He is described as tenant for life.

The remaining Defendant, Suteendurmohun Tagore (a minor), is the Grandson of Lullitmohun Tagore, who was dead at the date of the Will. He was born in the lifetime of the Testator. His Father and Grandfather died before the Testator. If the Will be valid, he is entitled to an estate in tail male.

It does not appear that any other person beneficially interested is in existence. The fourth Trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised except as to the alleged want of any description of the capacity in which Juttendromohun Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The Will provided for the Testator's Daughters and Grand-

children, but made no provision for the Plaintiff, stating that he had been already provided for in the Testator's lifetime. That provision was made by nuptial gift on the occasion of the Plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his Father, a zemindary, which then fetched 7,000 Rupees per annum, and the present value of which the Plaintiff does not state. Upon the death of the Plaintiff's first wife his Father also paid him the value of her jewels, to which he laid claim.

The explanation of the exclusion of the Plaintiff from any further provision by this Will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham v. Abraham* (9 Moore, P. C. 195), as to the law applicable to the convert's own property, or as to the personal relations of him and his family. The Act 21 of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the Plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the Will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the Testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the Testator had already made such provision for his Son, Ganendromohun Tagore (the Plaintiff), as he considered sufficient, and that Ganendromohun Tagore would "take nothing whatever under the Will," it purports to give all the Testator's property to four Trustees, of whom Juttendromohun Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real

estate or the income, or surplus income thereof, shall wish to retain for his and their own use”), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the Trustees, with power to change the securities,

To pay annuities afterwards given (except 1,000 Rupees a month afterwards given for worship) and legacies payable after the investment, and :

“ After payment of such annuities and legacies do and shall “ pay the surplus unexpended of the said interest, dividends, and “ annual proceeds unto the person or persons who for the time “ being shall, under the limitations and directions hereinafter “ contained and expressed, be entitled to the beneficial enjoyment “ of my real property, or of the rents and profits or surplus rents “ and profits thereof; and so soon as all of the said annuities and “ legacies shall have fallen in and been fully paid and satisfied, “ do and shall stand possessed of and interested in the said trust, “ monies, and securities, and the interest, dividends, and annual “ proceeds thereof, *in trust absolutely for the person or persons “ entitled, under the limitations and directions hereinafter contained “ and expressed, to the beneficial or absolute enjoyment of my said “ real property :”*

And as to “ realty or immovable property,” or of the nature of realty, to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities.*

And the residue “ to the person or persons ” for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the Will, “ for the absolute use of such person or persons respectively;” and the Will desires that the “ Trustees or Trustee shall hold the said real estate generally for the use and benefit of such last-mentioned person or persons for the time being, so far as is consistent with the trusts and provisions ” of the Will; that, after payment of

* This appears to be not strictly accurate, for I will show that the rents of the real estate were only to be applied on *the personal estate* or the income of the trust monies being inadequate to pay 1,000 Rupees a month for the worship of idols.

expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive 2,500 Rupees a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The Will then directs as follows:—

“And so soon as all the legacies and annuities (save and except the said sum of 1,000 Rupees for the worship of the said idols), given by this my Will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be).”

All the gifts, &c., in the Will are declared to be subject to the bequest to the Trustees, and to the provisions and declarations with reference thereto.

The Will, then, after reciting that the Testator's father had established certain idols at Molla Johur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the 1,000 Rupees, before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the Plaintiff, by annuities and legacies, to vest upon the Testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The Will then disposes of the real property as follows:—

“And whereas I am, amongst other property, possessed of and entitled to a zemindary or talook called Pergunnah Pat-

“leadah, and Kismut Patleadah, in Zillah Rungpore, subject to
 “an annual consolidated jumma, payable to Government, of
 “Rupees 40,555 : 13 : 3, and I am also possessed of and entitled
 “to other estates and property in Zillah Rungpore and other dis-
 “tricts, and also to a ghaut, which I have erected and built on
 “the river bank side of the Strand Road in Calcutta, and also to
 “land and buildings opposite thereto, abutting on and near to the
 “said road, and also to the Boitakhannah House, land and pre-
 “mises, where I usually reside, and also to various other parcels
 “of real estate. And whereas the frequent division and sub-
 “division of estates in Bengal is injurious alike to the families
 “of zemindars and to the ryots, who are in consequence oppressed
 “by numerous and needy landlords having conflicting interests,
 “whence arise disputes and litigations. And whereas I have
 “bestowed much time and money on the improvement of my
 “estates and of the condition of the ryots and tenants thereof,
 “and I am desirous that such improvements should continue to
 “go on, and should not be interrupted by any division of the said
 “estates or disputes concerning the same : Now, therefore, I give
 “and devise (subject always to the devise to the said Ramanauth
 “Tagore, Woopendromohun Tagore, Juttendromohun Tagore,
 “and Doorgapersaud Mookerjee hereinbefore contained) all the
 “real property of what particular tenure, nature, or kind soever,
 “and also library, horses, carriages, farm-yard, furniture of the
 “Boitakhannah, jewels, gold and silver plates, &c., which I
 “shall, at the time of my death, be possessed of or entitled to,
 “to and for the following uses, and subject to the following
 “provisions and declarations, that is to say :—Unto and to the
 “use of the said *Juttendromohun Tagore for and during the term of*
 “*his natural life ; and from and after the determination of that*
 “*estate*, to the use of the eldest Son of the said Juttendromohun
 “Tagore, *who shall be born during my life*, for the life of such
 “eldest Son ; and after the determination of that estate, to the
 “use of the first and other Sons successively of the said eldest
 “Son of the said Juttendromohun Tagore, according to their re-
 “spective seniorities, and the heirs male of their respective bodies
 “issuing successively ; and upon the failure or determination of

“that estate, to the use of the second and other Sons of the said Juttendromohun Tagore who shall be born during my life successively, according to their respective seniorities, for the life of each such Sons respectively; and upon the failure or determination of that estate, to the use of the first and other Sons successively of such second or other Sons of the said Juttendromohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the Sons of the said Juttendromohun Tagore born in my lifetime, and his first and other Sons successively, and the heirs male of their respective bodies issuing, may be preferred to and take before the younger of the Sons of the said Juttendromohun Tagore born in my lifetime, and his and their respective first and other Sons successively, and the heirs male of their respective bodies issuing; *and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the Sons of the said Juttendromohun Tagore, who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such Sons and the heirs male of his body may be preferred to and take before the younger of such Sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Shooshendromohun Tagore, the second Son of my Brother, Hurrucoomar Tagore, for the term of his natural life; and after the failure or determination of that estate,*”—

Then to the Sons of Sourendromohun Tagore and their Sons and the heirs male of their body respectively, in like manner as for Juttendro's, and after the failure or determination of the said several estates and uses, to the first and other Sons, and their Sons, and the heirs male of their body of Lullitmohun Tagore successively, and respectively in like manner as in the case of the Sons of Juttendro and Sourendro. Like limitations as to other persons as to which no further question arises.

Then follows a provision that adopted Sons shall be deemed Sons of the body within the Will, but be postponed to actual issue of the body.

The Will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create, as follows :—

“ And I declare that in the construction of this my Will, “ Sons by adoption shall always be deemed younger than and be “ postponed to Sons who are the issue of the body of their “ Father, and that the elder line shall always be preferred to the “ younger, and that every elder Son of each heir in succession “ by descent, and, failing descent, by adoption, and his issue or “ heirs male by descent, and, failing descent, by adoption, shall “ be preferred to every younger Son and his issue or heirs male “ by descent or adoption, to the exclusion of females and their “ descendants, and to the exclusion of all rights and claims “ for provision or maintenance of any person, male or female, out “ of the estate.”

It next provides that such estates of inheritance shall not be alienable, as follows :—

“ And I declare my will and intention to be to settle and “ dispose of my estate in manner aforesaid as fully and com- “ pletely as a Hindoo born and resident in Bengal may give “ or control the inheritance of his estate, or a Hindoo purchaser “ may regulate the conveyance or descent of property purchased “ or acquired by him, and not subject to any law or custom “ of England whereby an entail may be barred, affected, or “ destroyed.”

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder “ to be sold for arrears of Government revenues, or in case of failure to keep up in a due state of repair, and to use as his residence in Calcutta,” the Testator’s house and furniture, &c., in which case the person next in succession is to take as in case of death.

Then follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the Will consists in directions to the Trustees as to management and a power of appointment of new Trustees in case of death, refusal, or incapacity; and it

appoints the Trustees to be Executors, and gives certain powers to "the acting Executors or Executor."

There are two Codicils. The first makes further provision for the children of a Daughter. It speaks of the Testator's "Trustees or Trustee." The second revokes that portion of the Will which relates to worship and charity, which it states to have been otherwise provided for by the Testator.

The plaint, after stating these facts, alleges that the Trustees and Executors have, against the directions in the Will, improperly sold or disposed of a portion of the corpus of the personal estate, consisting of Company's paper, and that there is danger of future waste.

The plaint prays in substance that it be declared:—

1. That the Plaintiff, as only Son and heir-at-law, is entitled to represent the estate.

2. That the Testator had no absolute power of disposition, especially of ancestral estate.

3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void save so far as they give Juttendromohun Tagore a life interest, and that Plaintiff is entitled, after Juttendromohun Tagore's death.

4. That the Plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest, and

5. For further relief.

The answer of the Trustees and Executors, and that of Sourendromohun Tagore, admit the main facts, with some qualifications not at present material; and that of the Trustees and Executors denies that they have improperly disposed of the estate. They submit that the Will is valid, and ask for proper declarations and directions.

The infant Defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court:—

"1st. Does the plaint disclose any cause of action?"

"2nd. Did the Testator die intestate with respect to any and what portion of his estate?"

"3rd. Was any and what part of the immovable property of the Testator ancestral estate, and, if so, had the Testator power to dispose thereof by Will?"

"4th. Are any and which of the gifts or limitations contained in the Will and Codicils of the Testator void in law?"

"5th. What are the rights of the parties respectively under the Will and Codicils?"

"6th. Whether the Plaintiff is entitled to any and what maintenance out of the estate of the said Testator?"

"7th. Whether the Executors (Defendants) have misapplied any and what portion of the Testator's estate?"

At this stage, the cause was heard before the High Court (ordinary original civil jurisdiction), and the learned Judge, Mr. Justice Phear, dismissed the plaint.

Upon appeal before the High Court (Appellate Jurisdiction), present Chief Justice Peacock and Mr. Justice Norman, it was decreed:—

(a.) That the decree of the Lower Court be reversed.

(b.) That the plaint in this suit does disclose a cause of action.

(c.) That Prosonocoomar Tagore, the Testator in the pleadings, did die intestate as to certain portions of his property.

(d.) That part of the immovable property of the said Testator was ancestral estate, and that he had a right to dispose thereof by Will.

(e.) That the Plaintiff is not entitled to any maintenance.

(f.) That the devises and gifts to Juttendromohun Tagore for life are valid, and that (subject to debts, legacies, and annuities), he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in and be satisfied, to receive the sum of 2,500 Rupees a month out of the net rents of the immovable property, and also the surplus rents of the said immovable property, and the unexpended surplus of the

interests, dividends, and annual proceeds of the movable property which shall, from time to time, remain unexpended.

(g.) That the said Juttendromohun Tagore is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate.

(h.) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immovable property or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

(i.) That the trust as to the personal estate, after the annuities and legacies given by the Will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the Plaintiff, as the heir and representative of the said Testator.

(k.) That the Executors and Trustees are bound to render to the Plaintiff an account.

(l.) And after disposing of the costs it was ordered and decreed,

(m.) That the case be remanded to the Lower Court, with a request that it will try the sixth * issue and return its finding thereon, with the evidence to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the Plaintiff, by Juttendromohun Tagore, and by Sourendromohun Tagore respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the Defendant, Suteendurmohun Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindoo law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities

* Intended for the Seventh.

touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindoo system, in which property, whether movable or immovable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty—a distinction not known in Hindoo law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (*Tyler v. Walford*, 5 Moore, P. C. 304). In the Hindoo law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of *parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.*

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy (*Domat*. 2,413).

It follows directly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise *than the law directs*, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomonee Dossee v. Denobundo Mullick* (6 Moore, I. A., 555): "A man cannot create a new form of estate or alter the line of succes-

sion allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, *that a benignant construction is to be used*, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as under the present state of law it does by Will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other *than that specified by law*, expressly excluding *the legal course of inheritance*, as, for instance, if an estate were granted to a man and his eldest Nephew, and the eldest Nephew of such eldest Nephew, and so forth, for ever, to take as his heirs, to the exclusion of all other

heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime ; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with *the general law of inheritance, are void as such*, and that by Hindoo law no person can succeed thereunder as heir to the estates *described in the terms which in English law would designate estates tail*.

It remains, however, to be considered whether the persons described as heirs in tail or heirs of inheritance not recognized by law, are sufficiently designated to take successively by way of gift that which the Will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the Will upon the successive heirs in tail, or whether the language of the Will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindoo Law of Gifts during Life and Wills, and the extent of the Testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during Life is of the simplest character. As to ancestral estate, it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession ; but, by the law as prevailing in Bengal at least,* the impropriety of

* As to Madras, see, to the same effect, Valinayagam Pillai v. Paehche, 1 Madras High Court, R., 326, 1 Norton R. C., 334 S. C.

the alienation does not affect the legal character of the act (*factum valet*); and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the *Daya Bhaga*, c. 1, v. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindoo law recognizes an adopted child, whether adopted by the Father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the Father. In contemplation of law such child is begotten by the Father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the Testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the Testator, as if he had existed at the time of the Testator's death, having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of Will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by Will are legally binding, and recognizing the validity of

that form of gift as part and parcel of the general law. The introduction of gifts by Will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the Testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The Law of Will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse v. Rennell* (1 Clark and Finnelly, 546), in accordance with principles generally recognized.* "This case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for

* See this well stated in the introductory disposition of the Civil Code of Italy, Article 3, "Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tuttavia dubbio, si deciderà secondo i principii generali di diritto."

the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice Knight Bruce in the case of *Sreemutty Soorgeemoney Dossee v. Denobundoo Mullick* (9 Moore, I. A., 135), was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindoo succession, and Mr. Justice Phear, upon the authority of that case, held that "there is nothing in Hindoo law to prevent a Testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council), if at all, immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a Testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-

matter to which these remarks were applied will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the Will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The Testator devised an estate to several Sons, with a proviso that, if either of such Sons died without having a Son or Son's Son living at his death, neither his Widow nor Daughter should get his share, but that the same should go over to the other Sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Bhoobun Moyee Dabia v. Ram Kishore Acharj Chowdhry* (10 Moore, I. A., 279), in which the testamentary power of disposition by Hindoos in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindoos in India. It is obvious, therefore, that the conclusion arrived at in the Lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion, that a person capable of taking under a Will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the Testator.

Their Lordships, adopting and acting upon the clear general principle of Hindoo law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindoo law or usage.

These general preliminaries being laid down, it will be

proper next to examine in detail the various questions raised upon the discussion of the particular Will, in their natural order, first disposing of those which would apply equally to a gift as to a Will, and next, to those which affect the Will in question.

It was argued on behalf of the Plaintiff, in the first place, that the Will is void by reason of its being founded upon the creation of an estate in Trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindoo law, and that, as the foundation of the Will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the Trustees, and which are equally founded upon the trust, are unassailable. The Plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the Plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the Will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a Will to receive and pay A an annuity, and subject thereto in trust for B; if the trust be void, it should simply be struck out, and B would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindoo law. But it is obvious that property, whether movable or immovable, must for

many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognized and established here in the case of a Benamee purchase in *Goopeekist Gosain v. Gungapersaud Gosain* (6 Moore, I. A., 53); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the Will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the Testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the Will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the Trustees had renounced or, more correctly speaking, had not acted, their Lordships think this criticism unfounded in law and wholly inapplicable to the Will in question, which distinctly provides for the case of a Trustee not acting, and gives a directory power to fill up the number of Trustees when required.

Having disposed of the question whether there can be a trust estate, and shown that the distinction between "legal"

and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the Plaintiff to every beneficiary interest or estate created by the Will, except the legacies and annuities. A summary of the provisions and limitations in the Will, so far as they affect the parties to this suit, and limited for the present to the real estate and the personalty settled therewith, is as follows:—

2,500 Rupees per month to the "*person or persons* for the time being entitled," under the Will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the Trustees or Trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows, in the present tense, and therefore to operate at the moment the Will took effect, though "subject always to the devise to" the Trustees:—

1. To the Defendant, Juttendromohun Tagore, for life:
2. To his eldest Son born during the Testator's lifetime for life:
3. In strict settlement upon the first and other Sons of such eldest Son successively in tail male:
4. Similar limitations for life and in tail male upon the other Sons of Juttendromohun Tagore, born in the Testator's lifetime, and their Sons successively:
5. Limitations in tail male upon the Sons of Juttendromohun Tagore, born after the Testator's death:

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the Defendant) Sourendromohun Tagore for life :

7. Like limitations for the Sons of Sourendromohun Tagore and their Sons as for the Sons of Juttendromohun Tagore. Under these limitations the Defendant, Promodecoomar Tagore, who was alive at the death of the Testator, is (if the Will be valid) entitled for life, subject to the life estates of Jutteñdromohun Tagore and of his Father :

8. Like limitations in favour of the Sons of Lullitmohun Tagore, who was deceased at the date of the Will, and their Sons in tail male, as for the Sons of Juttendromohun Tagore. Under these limitations (if the Will be valid), the Defendant, Suteendurmohun Tagore, as the Son of a Son (his Father having died during the Testator's lifetime) would take an estate in tail male. He is the only Defendant in that situation :

The Will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest Son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the Testator desired to dispose of his estate "as fully and completely as a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant though of inheritance should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the Will, with a due regard to the principles already laid down, shows

that upon the face of it the Will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the Testator, and the limitations describing an inheritance in tail male, which is a novel mode of inheritance inconsistent with the Hindoo law.

The first life interest in Juttendromohun Tagore next requires attention. It was objected to on two grounds. First, because it was said that Hindoo law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life estate, reversion, remainder, and so forth. Secondly, it was said that the life interest was void because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of 2,500 Rupees per month, so that it is said this life estate may never come into existence, because the legacies and annuities, and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this: that because there is, as was contended, only one estate technically known to Hindoo law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the Plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits, and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any

authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by Will.

As to the second objection to the life interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life interest was to begin at once. It was subject to the devise to Trustees who were to receive the rents, allow the life-holder 2,500 Rupees per month out of the net proceeds, apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession, to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this Will alike according to its words and substance, as giving a life interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above 2,500 Rupees per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Juttendromohun Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favour of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to *the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different*

from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the Testator has attempted to create in each series of limitations, *is not authorized by Hindoo law.* It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents would be disregarded as an attempt to legislate. Accordingly, it has been argued in support of the Will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created, ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the Will, and conferred either upon Juttendromohun Tagore, whose family was intended, so long as it produced males descended of males, to represent the estate described by the Testator, by treating his life estate as converted or expanded into an estate of inheritance, according to Hindoo law, or, at least upon his Son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the Testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the Testator, expressed by the words of his Will, which will be advanced by this process; and we are not at liberty to invent for him a Will which will have the effect of creating an estate at variance not merely in details but in substance and effect with what he has said.

The proposed construction would contradict the Will in every particular expressed therein. It would give the Father a right of inheritance and a power of disposition when the Will says that he shall only hold for life. (Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nichols v. Nichols*, 2 W. Bl. 1,159.) The proposed construction would give the succession

from him to all his Sons equally, where the Will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. (Testing this alone by English precedents, it might plausibly be maintained by *Pitt v. Jackson*, 2 Brown, C. C. 51.) The proposed construction would give succession to women, whom the Will excludes. It would let in rights of maintenance, which the Will negatives. It would let in the power of alienation, which the Will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the Will, that the intention of the Testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the Will of an intention to create any other sort of estate; and the Will, as clearly as language can speak without express words, declares that it was not the intention of the Testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the Testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this Will would be something worse than guesswork as to what the Testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of *Humberston v. Humberston* (1 P. Wms. 1), so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the Testator, estates of inheritance will be inferred against the particular expression, in order to benefit as

nearly as may be in a lawful way all whom the Testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the Testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny v. Dering* (2 De Gex, Macnaghten, & Gordon, 145). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male, can be read or deduced from the Will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the Will took effect. The intention of the Testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the Will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the Testator's death except Suteendurmohun Tagore; and the validity of his claim to a life interest in succession stands upon the same ground as that of Sourendromohun Tagore and his Son, whose position must next be discussed.

Upon this the question arises whether Sourendromohun Tagore, Promodecoomar Tagore, and Suteendurmohun Tagore take life interests successively after that of Juttendromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the Testator no person to take under the first series of limitations except Juttendromohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the Testator, which no subsequent event could affect, and that the interest for life

after the death of Juttendromohun Tagore then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the Testator contemplated that his Will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the Will for supposing that he suspected. The true mode of construing a Will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the Testator, and to determine, upon a reading of the whole Will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended, under the circumstances, to be conferred.

If Juttendromohun Tagore should beget or adopt a Son, and die leaving the Son and Sourendromohun Tagore both surviving, either Sourendromohun Tagore (and after him his Son) must take at once and enjoy, to the exclusion of the Son of Juttendromohun Tagore, in spite of the Will; or the heir-at-law (who, though in terms excluded from benefit "under the Will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of Juttendro's Son, and of his issue male, actual or adopted, and Sourendromohun Tagore (or his Son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law, whose intervention was not contemplated by the Testator.

If Juttendromohun Tagore were to die leaving power to adopt a Son, who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely, to the exclusion of the Son, in spite of the Will, or the heir-at-law would enter as before stated.

Many other cases might be supposed in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the Testator's intention by keeping up the estate and

handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the Will.

Their Lordships reject the conclusion either that the Testator *meant to give an uncertain* interest of so strange and shifting a character, *or that there was an intention to give an absolute estate to precede the prior estates, in the event* not appearing to have been contemplated by the Testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "*failure or determination*" in fact *of an estate or estates which the Testator considered sufficient in law, and that these limitations over were in the scheme of this Will intended to follow the creation of the prior estates of inheritance, and must fall therewith.*

Their Lordships are thus of opinion that a life interest has been created in Juttendromohun Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the Will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the Will after the legacies and annuities had been disposed of, ought to be dealt with. Whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money

as a gift of the corpus to an uncertain person, who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested, amongst others, the construction that the person then in possession and his successors should take the entire income and profits without deduction; but he leant to the alternative that it was uncertain whether the Testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Juttendromohun Tagore the surplus of the interest remaining in the hands of the Trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the Testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the Trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons," instead of being rejected as inconsistent with a gift of the corpus, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, *because there was only one conveyance to be made for the benefit of all*. The words "or persons" in the plural were proper in the clause directing the Trustees not to convey, but to stand "possessed of and interested in the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust," absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that *one person was not to take all*, but that several persons were to take, and they could only take in succession *under the limitations in*

the Will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the Will in the largest sense, and "absolute" is classed by the Will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is, that after the legacies and annuities fall in and are satisfied, *the intention* was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the corpus remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Juttendromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the Plaintiff's claim to maintenance, their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The Plaintiff admits a marriage gift of his Father of real property, producing at the time 7,000 Rupees per year, which, *primâ facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonocoomar Tagore's property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally, and

not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a Son not provided for might compel a frugal Father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is, whether the obligation, moral or legal, of the Father to provide a reasonable maintenance for his Son, is satisfied by a marriage gift of a *primâ facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the Plaintiff has laid no foundation for further inquiry, either in law or fact.

The Plaintiff's claim to an account must next be considered. He takes nothing under the Will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the Will, and he is entitled to the protection of the law to keep that inheritance intact, until he comes into its enjoyment. He has averred, upon information and belief, that the Trustees, "against the directions contained in the Will," sold securities for money, consisting of Government paper, "out of the corpus of the estate of the said Testator, and have improperly applied the proceeds thereof." Issue was taken by the Trustees upon this averment. In the High Court (original ordinary civil jurisdiction), Mr. Justice Phear considered this statement of the Plaintiff insufficient, because "the Trustees and Executors are distinctly empowered by the Will to pay debts and legacies out of the personalty; and the selling of the Government paper of which the Plaintiff complains may, as far as anything goes which is stated by the Plaintiff, have been effected for that purpose." The High Court (Appellate Jurisdiction), however, directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the Defendants' knowledge and not within the Plaintiff's, and that the statement as to the sale being "against the direction contained

in the Will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the Plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life interest of Juttendromohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale v. Briggs* (8 De Gex, Macnaghten & Gordon, 391), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the Judgment of the Lord Justice Turner, p. 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the Will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose, of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the Will, their Lordships are of opinion that the costs as between attorney and client of all parties in the Lower Court upon appeal to the High Court (Appellate Jurisdiction), and of the appeals to Her Majesty in Council, ought to be paid out of the estate, taking first the corpus of the personal or movable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (Appellate Jurisdiction) be in part affirmed, and in part varied, and that additional declarations of the rights of the parties should be made as follows; that is to say, that the said decree be affirmed,

so far as it orders that the decree of the Lower Court in its ordinary civil jurisdiction be reversed, and that the plaint in this suit does show a cause of action, and that the Testator died intestate as to certain portions of his property, and that part of the Testator's immovable property was ancestral estate, and that he had a right to dispose thereof by Will, and that the Plaintiff is not entitled to any maintenance from the estate of the Testator, and that the Plaintiff is entitled to an account as directed by the decree of the High Court (Appellate Jurisdiction); and, as to the residue of the said decree, that the same be varied, and the following order and decree substituted for the same; that is to say, that the Defendant Juttendromohun Tagore is beneficially entitled to a life interest under the said Will in the real or immovable property, and also in the personal or movable property vested in the Trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the Will not hereby declared to be void; and also, until the legacies and annuities fall in and are satisfied, to receive 2,500 Rupees per month out of the net rents of the real or immovable property; and also the surplus rents of the same, and the unexpended surplus of the interest, dividends, and annual profits of the personal or movable property which from time to time remain unexpended after the payments by the Will directed to be made thereout; and also that, subject to the trusts for payment of the legacies and annuities, the said Juttendromohun Tagore is beneficially entitled for his life to use and enjoy the library, carriages, horses, farm-yard, furniture, jewels, gold and silver plates, and other articles belonging to the said Testator, except the jewels, household furniture, and other articles which, at the time of the Testator's death, was or were in the personal use of any member of the Testator's family, which by the Will are not, or were not to be collected, or got in, or sold by the said Trustees and Executors; and that the limitations in tail male and subsequent limitations in the said Will respectively have failed, and are void, and that, upon the failure or determina-

tion of the life interest of the said Juttendromohun Tagore, the Plaintiff, subject to the provisions in the said Will not hereby declared to be void, is entitled, as heir-at-law of the said Testator, to the real and personal property in respect of the receipt and enjoyment of which the said life interest is declared, and that upon the expiration of the said life interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the Plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh* issue, and return its finding thereon, with the evidence to the High Court (Appellate Jurisdiction); and that the costs of the parties respectively in the Lower Court, of the appeal to the High Court (Appellate Jurisdiction), and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the corpus of the personal or movable property, and that the future costs, if any, be reserved and disposed of by the High Court (Appellate Jurisdiction) upon the taking of the account by that Court directed.

EXAMINATION OF THE ABOVE JUDGMENT.

In examining the above decision, I may as well give the remarks of the Court in giving judgment on the subject of disposing of property. The Court observe: "The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy."

* In the decree, as printed, erroneously called the sixth issue.

Now comes the deduction of the Court from such principles :—

“It follows directly from this, that a private individual who attempts by gift or Will to make property *inheritable otherwise than the law directs, is assuming to legislate*, and that the gift must fail, and the inheritance take place *as the law directs*.” This was well expressed by Lord Justice Turner, in *Soorjeemoney Dossee v. Denobundo Mullick* (6 Moore, I. A., p. 555): “A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.” Where the Court found the above passage attributed to that excellent and just Judge, Lord Justice Turner, I know not, but I do not find it under the reference given. Let the reader pass over the four next paragraphs of the judgment, and he will find the following: “If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest Nephew, and the eldest Nephew of such Nephew, and so forth, for ever, to take as heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is *consistent with the law*. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.”

“It follows that *all estates of inheritance created by gift or Will, so far as they are inconsistent with the general law of inheritance, are void as such*, and that by Hindoo law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail.” The Court appear to forget that they are speaking of a Will

which, if English law were applied to it, not only could, but would, be carried into effect, and this the Court itself admits. What the Testator here does, is to give an estate to certain parties for life, and afterwards that the property should go according to the law of primogeniture,—this is the substance of his Will, independent of the clause conveying the reversion.

The whole of the above assertions of the Court are founded on the assumption that there is any limit in Bengal to a Father's authority in disposing of his estate. If there were anything in the gift inconsistent with the nature of the estate conveyed, such would not vitiate the estate given. It is no objection to a Will that it interferes with the ordinary course of descent. Every Will that gives an estate away from the heir does interfere with the course of descent. The Court affirm that he cannot alter the course of descent by directing the estate to go in a different course of inheritance than it would if there were no Will. My proposition is plain, that he is the absolute owner of the property, and that *no law* controls his power of dealing with it. If the Court's proposition, that he could not make an estate descend in a manner contrary to the ordinary Hindoo law of inheritance, were correct, how would that proposition hold with the case put by Lord Lyndhurst, in *Freeman v. Fairlie* (1 Moore, I. A., p. 344), of a native conveying his entire interest in the estate to a European in Calcutta? The estate would descend in a manner essentially different from the way it would go by Hindoo law. Suppose, in the case before Lord Lyndhurst, the native had granted to the European an estate in tail male, keeping the reversion to himself. It is clear from Lord Lyndhurst's opinion that such would be valid, for, as Lord Lyndhurst observed, the law of England would attach to it. In such a case no limitation could alter the power of the European to cut off the entail. Such a case would be decisive as to the power of the owner, to create an estate tail. Whether a native conveying land according to the law of primogeniture could create the various incidents applicable to such an estate in the Mofussil is one matter, but to affirm that he cannot give an estate according

to the order of primogeniture is directly opposed to the leading case, the Nuddeah case reported at p. 2 of 1 Sudder Dewanny Adawlut, in which *it was done*.

In that case the zemindar did convey his estate to his eldest Son, disinheriting the three others, and the gift was supported by the Court as a valid gift to the parties in succession. The Government, also, are in the habit of granting lands to parties according to the law of primogeniture, and examples may be found in the Privy Council Reports. Abundant instances could be produced by the Governments of Calcutta, Madras, and Bombay. In a Ghatwallee tenure, the lands descend to the eldest Son (*see* 6 Moore, I. A., p. 101; 6 Moore, I. A., p. 426; 6 Select Reports, 169). It will be seen, moreover, from 6 Moore, I. A., p. 102, that the zemindars created the Ghatwallee tenure in that case mentioned, which, in effect, directed the lands to descend to the eldest Son in exclusion of the others. This is in direct opposition to the principle maintained by the Court in their decision. The power to make such a grant did not arise from the object to be attained, but rested on the power of the party to convey and give title to the land. The right of the Government to create such a tenure is undoubted.

What is there in the present case that should prevent these great estates, larger than an English county, from going, as the Nuddeah estate did, according to the law of primogeniture? The Hindoo law itself, in Bengal, where no Will interferes with its operation, is a species of entail. If the doctrine maintained by the Court be correct, the Government grants according to the law of primogeniture must be void. This observation will be equally applicable to the Ghatwallee tenures. Gifts for religious purposes or for works beneficial to the community do alter the order of inheritance; are they, too, void? What supports such gifts in perpetuity?

I answer, the Will of the party who has full dominion over the estate. The sixth clause of Regulation 11 of 1793 contemplates the power of a Testator not merely to disinherit a Son, but to give the property over *in any manner he chooses*.

The Court say, "that a private individual who attempts by gift or Will to make property inheritable *otherwise than as the law directs* is assuming to legislate, and that the gift must fail."

The proposition of the Court is, "that all estates of inheritance created by gift or Will, so far as they are inconsistent with the general law of inheritance, are void as such. The proposition laid down by the Court assumes the very point in question in the case. The proposition itself, moreover, is not accurate. If a party were to sell his estate to a stranger, the estate would go in a different line of inheritance from that which would take place if no Will existed. The law of inheritance does not, in Bengal, restrict a Father in willing away even ancestral real estate. The fallacy which lies under such general remarks, arises from importing into the consideration of this matter a rule applicable to cases under the Mitacshera, but which has no application to Bengal. Under the Mitacshera, Sons have by birth a vested interest in ancestral real estate, and a Father, according to cases decided in unison with the opinion expressed by that writer, cannot vary the right of Sons to such property. No such rule applies to Bengal, and, as I have shown, the contrary has been uniformly decided. In every case where property is given away from the heir, you are varying the order of inheritance. In every case where a Testator in Bengal gives property for religious purposes, or purposes beneficial to the community, he is varying the law of descent, and is varying it in perpetuity. What gives validity to the gift? Not the religious or beneficial purposes, but the right of the party having dominion over the property to convey *in perpetuity*. All this was fully examined in the great case of *Freeman v. Fairlie*, by that great Judge, Lord Lyndhurst.

That there may be no mistake as to what fell from Lord Justice Turner in delivering the judgment in the case in 6 Moore, p. 550, *Sreemutty Soorjeemoney Dossee v. Denobundo Mullick*, I give an extract from the report: "It is a question between the estate of Surropechunder and the parties claiming

under the gift over; and, as it seems to us, it must depend wholly on the construction of the Will. In determining that construction, what we must look to is *the intention of the Testator*. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the Testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the things to be regarded is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the Testator, in the dispositions which he had made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption."

In the present case the Testator has actually given the entire property to the Executors and Trustees to hold for the general benefit of others, contradistinguished from the Plaintiff, with this additional direction, that having given his Son what he deemed sufficient, he was to take nothing. In giving this direction he was only carrying out the unrepealed injunctions of the Hindoo law. Yet the Court in the present case have declared that such intention shall not be carried into effect.

The principles laid down by Lord Justice Turner in the above judgment would in no degree support the present decision.

I will now refer to a judgment of the Privy Council in which the principles for construing Wills are carefully examined. The judgment was delivered by Lord Kingsdown, in *Towns v. Wentworth* (11 Moore, P. C. C. p. 526); it is most important, and is in perfect unison with the above judgment delivered

by Lord Justice Turner. The words of Lord Kingsdown are as follows :—

“ In order to determine the meaning of a Will, the Court must read the language of the Testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when the rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the Testator has by his Will excluded beyond all doubt that construction. When the main purpose and intention of the Testator are ascertained to the satisfaction of the Court, if particular expressions are found in the Will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expression *must be discarded*, or modified; and, on the other hand, if the Will shows that the Testator must necessarily have intended *an interest to be given which there are no words in the Will expressly to devise*, the Court is to supply the defect by implication, and thus to mould the language of the Testator so as to carry into effect, as far as possible, the intention which it is of opinion that the Testator has on the whole Will sufficiently declared.” The above exposition of the principles which should be applied in construing Wills is directly opposed to the present decision. It will be seen, when I examine the right to disinherit, that the various cases cited by me are expressly supported by the judgment of this great lawyer, Lord Kingsdown.

The general proposition of the Court is founded on pure assumption; the expression of “ *otherwise than as the law directs*,” presupposes that some law interdicts his leaving property away from the parties who would succeed if there were no Will. In cases where no Will exists, the law determines the party or parties who are to take the inheritance. No such principle applies where the right to will is established. As Sir Henry Seton observed, in *Mushleah v. Mushleah*, *Fulton’s Reports*, p. 425: “ Where testamentary power is unlimited, the law of descent is of minor importance.” In Bengal, a Testator can give his property to whatever person he chooses. It is the

more singular that such observation should fall from the Court, when the principle on which Wills in Bengal stand has been thoroughly investigated, and is perfectly well understood. It rests on the uncontrolled will of the Father. Even in a joint family, where the rule of the Mitacshera prevails, if there be no lineal male descendants, the will of the Father is uncontrolled, and the consent of Nephews to a sale of ancestral real property would not be required (*see* S. D. A., 1859, p. 1,314). In all cases of self-acquired property, even where the law of the Mitacshera prevails, the control of the Father is unlimited. It may throw light on this matter to show the opinion of various judges on the subject. Sir Francis Macnaghten, at p. 319, speaking of the Supreme Court with reference to Hindoos, observes :—

“It never indeed has declared, nor do I know that it ever has been called on to declare, any restraint with respect to the disposition of ancestral immovable property. It has declared, on the contrary, that there is not any restraint.”

The Chief Justice of Calcutta, Sir James Colville observed, in giving judgment in the case which came before the Privy Council in Sonatun Bysack's case (8 Moore's Reports), had been unable to find any law which interfered with giving property in perpetuity. Sir Barnes Peacock, in the case I have given, expressly denies that any law prevented a party from giving property in perpetuity, and the case of Sonatun Bysack expressly overruled the decision which held a gift void as tending to a perpetuity, and established what in England would be deemed a perpetuity.

In a Parsee case at Bombay (6 Moore, I. A., p. 448), the Court considered that there is no restraint on the testamentary power of a Parsee; and Lord Justice Turner observed, at p. 463, that the Court did not give any encouragement to suppose there was any such limit as the Appellant contended.

In 6 Moore, p. 344, the Right Hon. Pemberton Leigh, when delivering judgment, maintained that “throughout Bengal a man who was the absolute owner of property might now dispose of it by Will as he pleased, whether ances-

tral or not;" and the learned Judge states that such was determined by the reference to the *Sudder* which has been alluded to.

In *Abraham v. Abraham* (9 Moore, p. 243), Lord Kingsdown, speaking of property, observed: "Now, Mathew Abraham acquired the nucleus of his property himself; no law imposed any fetter upon him as to his mode of dealing with it."

The *Mitacschera*, at c. 1, s. 1, par. 30, p. 257, and the *Chintimani*, at pp. 250 and 314, both maintain the absolute power of the Father over self-acquired property.

It is assumed that he cannot give an estate to one Son and his descendants in the male line, but that is contradicted not merely by his general authority, but by the leading case in 1 S. D. A., p. 2, and especially by the *Ghatwallee* tenures I have alluded to, which are directly in point to show that property can be given to the eldest Son according to the law of primogeniture.

The Regulations of Government do not give the owner of property a *restricted* power. All this has been carefully examined by Lord Lyndhurst in *Freeman v. Fairlie*, in 1 Moore, I. A., p. 342.

Regulation 1 of 1793, s. 9, art. 8, enacts: "That no doubt may be entertained whether proprietors of land are entitled under the existing Regulations to dispose of their estates without the previous sanction of Government, the Governor-General in Council notifies to the zemindars, independent talookdars, and other actual proprietors of land, that they are privileged to transfer to whomsoever they may think proper, by sale, gift, or otherwise, their proprietary rights in the whole or any portion of their respective estates, without applying to Government for its sanction to the transfer; and all such transfers will be held valid, provided that they be conformable to the Mahomedan or the Hindoo laws (according as the religious persuasions of the parties to each transaction may render the validity of it determinable by the former or the latter Code), and that they be not repugnant to any Regulations now

in force which have been passed by the British Administrations, or to any Regulation that they may hereafter enact."

I have already alluded to the 6th clause of Regulation 11 of 1793, which shows the opinion of Government on this subject, for when, alluding to a Father conveying property to one Son in exclusion of others, the section states that such property is to be conveyed "in the proportions, and to be held *in the manner, which such proprietor may think proper.*"

All this is supported by the Regulation 5 of 1799 regarding Wills, s. 2, which enacts that when parties had left Wills and appointed Executors, such Executors were to take charge of the estate of the deceased, and to proceed in the *execution of their trusts according to the Will of the deceased*, with a direction to the Courts not to interfere except in certain cases.

Since the Court, in the present decision, have limited the power of a Testator in Bengal, let me see what authority has been given to a landed proprietor by other Regulations.

The power to grant lands in perpetuity for religious matters, or for purposes beneficial to the public, has never been doubted by the Court.

By Regulation 8 of 1819, s. 3, the landholder may grant Putnee talooks, and it is declared that such shall be deemed to be valid tenures *in perpetuity*, according to the terms of the engagements under which they are held. They are heritable by their conditions; and it was further declared that they were capable of being transferred by sale, gift, or otherwise, at the discretion of the holder.

By Regulation 18 of 1812, s. 2, powers are given to proprietors of land to grant leases for any period, *even to perpetuity*, and at any rent which they might deem conducive to their interests.

It is not possible to maintain that a proprietor of land had no power to convey land in perpetuity for temples and works, either religious or beneficial to the public, for the preamble to Regulation 19 of 1810 is decisive on this head, and is as follows:—

"Whereas considerable endowments have been granted in

land by the preceding Governments of this country, and *by individuals*, for the support of mosques, Hindoo temples, colleges, and for other pious and beneficial purposes; and whereas there are grounds to suppose that the produce of such lands is in many instances appropriated contrary to the intentions of the donors,—to the personal use of the individuals in immediate charge and possession of such endowments; and whereas it is an important duty of every Government to provide that all such endowments *be applied according to* the real intent and Will of the grantor; and whereas it is moreover essential to provide for the maintenance and repair of bridges, serais, kutras and other buildings, which have been erected either at the expense of Government or of individuals for the use and convenience of the public, and also to establish proper rules for the custody and disposal of nuzzool property, or escheats; the following rules have been enacted.”

In the 3rd section it directs the Board of Revenue to see that such intentions are carried out in the present judgment. The principle laid down by the Court, that in making property inheritable otherwise *than the law directs*, we are assuming to legislate, is true in no respect. In the first place, it assumes that the law in Bengal directs a Testator in what manner he shall dispose of his estate, and by relying on such a principle (a mere fallacy with reference to this case), the judgment not only defeats the plain intention of the Testator to give his property to those who were the proper persons under the circumstances which have occurred to perform his funeral rites, the children of his Brother, but it goes on to declare the rights of a party who was distinctly and plainly disinherited by the Testator.

It is the more singular that this should be done when the Court in their judgment admit that “in the Hindoo law of inheritance, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.” The Plaintiff could not perform them, no Bramin in India would be present at the occasion.

It would appear that Sir Barnes Peacock, in his remarks accompanying the decree, in the Court below (*see* p. 165), ap-

parently treats religious endowments as an excepted case. By doing so, he does not appear correctly to understand the true ground on which his own decision rests with reference to creating a perpetuity. He observed, in the case I have alluded to, that no objection on such a ground had ever been allowed by the Sudder Dewanny Adawlut. That is true, but the real ground which supports such a grant is the absolute dominion which the party making such a grant has over the property.

The Legislature direct the Courts not to interfere with the religious feelings of the people, but the validity of such a grant does not depend on the purpose intended, but on the title to convey. The same principle applies to grants for public purposes unconnected with religion.

The right to give lands in perpetuity, either for religious purposes or for objects beneficial to the community, is, when *duly considered*, literal destruction to what is attempted to be maintained, that a Testator is restricted from granting the estates bequeathed. This, when coupled with the extensive powers given by the various Regulations of Government, is decisive against what is contended for by the Court. The Testator might have granted a lease in perpetuity to one, and have given the remaining portion of his estate to another.

The proposition of the Court, that he cannot create an estate of inheritance according to the law of primogeniture, is a naked assumption of the point in question. An estate according to the law of primogeniture is surely not so extensive as an estate in perpetuity.

But the decision of the Court, taking the estate away from the family, does not only depend on the propositions I have just been examining. Another principle has been assumed for the purpose of disposing of the claims of Joteendro's children to the estate.

It seems to me that the finding of the Court, that a Will of a Hindoo Testator giving property to the unborn Son of his own Nephew is void, runs counter to the common feelings of mankind, and in plain truth is even inconsistent with their own decree. Let me explain this. The Court, in endeavouring to avoid the effect of the various cases cited with reference to

adopting an unborn child, assume that such power is given by way of exception. If the proposition be true that property cannot be given to an unborn Son, an adopted Son would stand in a better position than a natural Son.

The passage in the Daya Bhaga is at c. 1, par. 21: "The right of one may consistently arise from the act of another, for an express passage of law is authority for it; and that is actually seen in the world, since in the case of donation the donee's right to the thing arises from his relinquishment in favour of the donee who is a sentient person." This is no allegation that the giver may not grant to a party who may come into existence. If, however, it is to be taken as a positive prohibition of making a grant if such party be not in existence, it will not do for the Court to *import* into the passage of the Daya Bhaga the following rule:—"The law is plain that the donee must be a person in existence capable of taking *at the time when the gift takes effect*."

If such a principle were true, an unborn Son, in a joint family where there was no Will, coming into existence would not take a share. If this paragraph in the Daya Bhaga established that you cannot give an estate to an unborn person, it is very singular that such a principle is not in any other part of Jimuta Vahana's work noticed by him.

Jaganatha, too, in his Digest, never notices any such law.

It is perfectly clear that if any such general rule as alleged existed, the author of the Mitacshera *must have noticed it*. This writer expressly maintains the right of unborn members of a joint family in the following passage:—"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should therefore—" (c. 1, par. 27, p. 257).

Jimuta Vahana was merely illustrating his observations, not laying down any rule so mischievous.

It is clear from the note to par. 21 in the Daya Bhaga regarding letting loose of a young bull at the funeral, that it was not a relinquishment of the property in the animal, and that the objects of gift were sentient beings, not animals.

It seems to me an unsound proposition, striking at the very root of the relations of life, to hold that a man, the absolute owner of property, may not provide for the unborn children of his own Nephew, merely on the ground of a loose expression of the author of the *Daya Bhaga*, whose work from beginning to end maintains the absolute power of the Father over his estate.

If the proposition contended for be true, what becomes of the dedication of works for the benefit of the public. Take the case of a tank or a bungalow for the reception of travellers. If no rights can be given to unborn parties, do the grants in such cases cease with the parties in existence? Most assuredly they do not. Yet if this principle be true, those who are unborn would have no right to use either. In the present case the gift to the University is for the benefit of parties unborn.

Is it not singular that, though nearly one hundred years have elapsed since the establishing a Supreme Court in Calcutta, no one writer on Hindoo law, or any one case among the numerous decisions which have been passed, has ever supported the doctrine promulgated by the Court below? The point of divergence between the two Schools was this: the Pundits of the Bengal School held that an after-born Son's rights could not be affected on account of his not being alive when the succession opened; whereas the opposing Pundits maintained, *not* that an unborn Son could never inherit, but that his right to inherit was dependent on the contingency of his being in existence when the succession was vacated. Such assumption of the illegality of a grant to an unborn Son disappears on the mere statement of the nature of the dispute between the two Schools. It can do no harm for me to repeat these observations, as they are of essential importance in considering this question.

The proposition which is alleged to flow from the passage in the *Daya Bhaga* is this, that a Son who is not in existence cannot take property by Will. In order to avoid the effect of the different references to cases of adopting unborn Sons, the Court affirm that such is an exception, and does not interfere with the general rule. I will now give a reference which is a

direct refutation of the alleged principle that an unborn Son cannot take property. I take it from the Daya Bhaga, c. 7, par. 12, p. 138 of Colebrooke's translation (*see* Yajnyawalkya). "When the Sons have been separated, one afterwards born of a woman of equal class, shares the distribution. His allotment must *positively be made* out of the visible estate corrected for income and expenditure." This is not an excepted case of adoption, but is the general law, that an unborn Son is not incapable of taking property; and this text of Yajnyawalkya is the very text on which the author of the Mitacshera comments, and the same principle is laid down by the Mitacshera at c. 1, s. 6, par. 8, pp. 281 and 282.

It is clear, therefore, that the non-existence of a party will not prevent him, on coming into existence, from claiming property even after a partition.

It is clear from the following texts that trusts are acknowledged:—

Vyasa—"What is given to a bride at the time of her nuptials, with a declaration *of its use* made by the giver to the bridegroom, shall be her entire property, and shall not be shared by her kindred."

Vyasa—"What, indeed, shall be given *at any time* to the Husband in trust for his Wife, the Daughter of the giver shall insure to her use, whether her lord live or die; and on her death, to the use of her issue, 2 Digest, pp. 153, 154.

It could not be contended with success, after such texts, that provision could not be made for the unborn child of such marriage.

In the case I have before alluded to, the Bengal Pundits *maintained even if* a Son came into existence after the death of a Widow, that still he would take; but the opposing Pundits succeeded, and it has been held that the party must be in existence at the time the succession opens. Here no objection can be made on the ground of the estate being in abeyance, for the entire property is vested in the Trustees. It is a matter of no importance for me to argue such a thing in the present case, because Joteendro is alive.

ON DISINHERITING A SON.

With reference to the question of disinheriting, it may be useful to collect the different passages in the Will which bear on the disposition of the real estate. In the early part of his Will (pp. 114 and 115, s. 4), the Testator observes: "I have already made such provision for my Son, Ganender Mohun Tagore, as I consider sufficient, and he will take nothing whatever under this my Will." In the next paragraph he says, "I give, devise, and bequeath all my property, both real and personal, of what nature or kind soever, unto and to the use of Ramanauth Tagore, Woopender Mohun Tagore, Joteendro Mohun Tagore, and Doorga Persaud Mookerjee (all residents in the town of Calcutta), their heirs, executors, administrators, representatives, and assigns, according to the nature and tenure of the said property, to hold the same upon the trusts hereinafter declared."

At p. 128, s. 30, is the following passage:—"I declare my will and intention to be to settle and dispose of my estate in manner aforesaid, as fully and completely as a Hindoo born and resident in Bengal may give or control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him." After disposing of the personal estate in the manner I will subsequently examine, at p. 125, he settles his real estate by giving a life interest to Joteendro, with a reversion in tail male, according to the order of primogeniture, to the Son adopted or natural of Joteendro; and in the event of no such Son existing, he gives a life interest to the Brother of Joteendro. After other limitations for life to persons in existence, he directs the real estate to descend according to the order of primogeniture.

The Testator, at p. 117, directs that the residue of the rents and profits of the real estate, after making certain payments, should be paid to the person or persons for the time being to whom (subject to the desire [devise it should be] hereinbefore made to my said Trustees) I have given and devised the said real estate, under the limitations and directions hereinafter contained for the absolute use of such person or persons respectively. Then

comes this important clause :—" I desire that my said Trustees or Trustee shall hold the said *real estate generally* for the use and benefit of *such last-named person or persons* for the time being, so far as is consistent with the trusts and provisions by and in this my Will created and contained ; *and on the debts, legacies, and annuities being paid*, in trust to convey the said real estate and premises unto the use of *the person* who shall be entitled to the beneficial interest therein, with like limitations, provisions, and directions."

Now, this person to whom the estate was to be conveyed is Joteendro, for both the Court below and the Privy Council have found that Joteendro is the party entitled to the beneficial interest.

Under this clause I contend that Joteendro takes the reversion in fee, and this will be carefully considered when I examine the Court's decision respecting the personal and real estate. The direction to hold the *entire real estate* for the benefit of the parties mentioned in his Will, *is an express disinheriting of the Plaintiff*, and the conveyance to be executed on delivering up the estate, is to contain the limitations in the Will mentioned, with a further direction to convey the estate to the party entitled at that time to the beneficial interest in the estate.

In this case not merely do the Court declare that the estates given by the said Testator shall not take place, but they actually declare a party entitled to the absolute reversion, after a life interest, when the Testator has expressly declared that interest he shall have none. I affirm that, under this Will, the Plaintiff is plainly disinherited, for the parties to whom the real estate is given are distinctly named. In the decree of the Appellate Tribunal, I find this passage :—"That the Testator died intestate as to certain portions of his property ; that the limitations in tail male and subsequent limitations in the said Will respectively have failed, and are void ; and that upon the failure or determination of the life interest of Joteendro Mohun Tagore, the Plaintiff, subject to the provisions in the said Will not declared to be void, is entitled, as heir-at-

law of the said Testator, to the real and personal property in respect of the receipt and enjoyment of which the said life interest is declared; and that upon the expiration of the said life interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the Plaintiff as such heir-at-law."

There seems some inaccuracy in the expression "has died intestate as to certain portions of his property." If it be merely meant to show that the Court deem certain portions of the Will to be void, I need not comment upon it, for the entire estate, real and personal, is absolutely vested in the Executors and Trustees in trust, for the benefit of parties specifically named, with this additional remark:—"I have already made such provision for my Son, Ganender Mohun Tagore, as I consider sufficient, and he will take nothing whatever under this my Will." It is singular that the Court should say very little on the subject of disinheriting. The High Court, in its Appellate jurisdiction, rested the claim of the Plaintiff on the following ground:—"That the Plaintiff, as the heir-at-law of the Testator, is entitled (not under the Will, but notwithstanding the Will) to a general estate of inheritance *in reversion* in the unmovable property of the Testator, and that by the Will no estate *larger than an estate for life* has been validly created, and that there *is a resulting trust* on the Plaintiff."

In citing the above passages from the Will, I cannot but contrast them with the remarks of Sir Barnes Peacock, in the Court below. Regarding disinheriting, at page 193, he states: "There is nothing to show that the Testator intended to disinherit his Son, under all circumstances." The mere consideration of the Hindoo law would be sufficient to refute such a statement. By the Hindoo law, not only does all intercourse cease between the Testator and his Son, but even maintenance is refused by some authorities; and even those who admit that the party may be supported, limit such to a bare subsistence (*see* Daya Bhaga, Colebrooke's translation, p. 103 and 104, c. 1, pp. 11 and 13). It is a mistake to suppose that any insulting proceedings are necessary to dissolve the Son's intercourse with

the family. Let me examine this statement of the Chief Justice by considering what he, the Testator, has done with reference to the real estate. By a clause in the early part of the Will, the entire estate, real and personal, is vested in the Executors and Trustees on the trusts declared by the Will, with this injunction, that having given to his Son what he deemed a sufficient provision, he was to take nothing whatever under his Will. The Trustees held the entire estate for the purpose of carrying out the intentions of the Testator. In the passage I have given, the Testator actually states that he had given his real estate for the benefit of others, contradistinguished from the Plaintiff, and he shows who the parties were. First come the life estates, then the estates tail, and after that comes the clause directing the Trustees to convey the real estate and premises to Joteendro, subject to the previous limitations. The Testator has named the parties to whom the real estate was to be conveyed, but I shall enlarge more fully on this when I examine the judgment of the Court regarding the real and personal estate.

I am not at all surprised that the Judges in the Court below should overlook the importance of the clause directing the Trustees to convey the real estate and premises to Joteendro; for, resting on the loose expression which fell from Lord Hardwicke, they both deemed the devise over to be void, either on the ground of remoteness or uncertainty—they never looked at it in the light of a plain valid devise, as it unquestionably is. (*See Mr. Justice Norman's remarks at page 236.*) With the above prefatory remarks, I may observe, that a Father's right to disinherit a Son has been alike exercised and supported in India. We find such power even noticed in the Regulations of Government—Regulations 1 to 48 inclusive form the Code of the country. In Regulation 11 of 1793, the preamble, when speaking of a custom under native administration, that on the death of a proprietor extensive Zemindaries were not liable to division, but devolved entire to the eldest Son, to the exclusion of all other Sons or relations, it enacts, s. 2, "That after 1st. July, 1794, if any Zemindar, independent Talookdar, or other

actual proprietor of land, shall die without a Will, or without having declared by a writing or verbally, to whom *and in what manner* his or her landed property is to devolve after his or her demise, and shall leave two or more heirs who, by the Mahomedan or Hindoo law (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled."

Then, after one or two clauses not here important, at s. 6, it is provided that nothing contained in this Regulation "Is to prohibit any actual proprietor of land bequeathing, or transferring by Will, or by declaration in writing, or verbally, either prior or subsequent to the 1st July, 1794, his or her landed estate *entire to his or her eldest Son* or next heir, or other Son or heir, *in exclusion of all other Sons or heirs, in the proportions* and to be held in the manner which such proprietor *may think proper*; provided that the bequest or transfer be not repugnant to any Regulations that have been or may be passed by the Governor-General in Council, nor contrary to the Hindoo or Mahomedan law; and that the bequest or transfer, whether made by a Will or other writing, or verbally, be authenticated by, or made before, such witnesses, and in such manner as those laws and Regulations respectively do or may require."

It is perfectly clear that the Government contemplated the disinheriting a Son by the Will of the Father. As to the Chief Justice in the Court below not seeing any general intention to disinherit his Son, I may refer the reader to my remarks on Religion, from pages 306 to 312.

And now as to the question of disinheriting. It is clear that, under this Will, if there were no constructive trust, the Plaintiff is disinherited. Let me review the cases which will support this proposition beyond the possibility of doubt.

It was that great Judge, Lord Hardwicke, who put the matter of the exclusion of an heir-at-law on its true and plain grounds, and subsequent cases have amply borne out the prin-

ciples laid down by him. One of the earliest cases is *Maundy v. Maundy* (2 Strange, 1,020). The following were the facts of the case:—*Ventris Maundy*, being seized of a reversion in fee of houses value £260 per annum, then let on lease for 60 years at £22 per annum, called a ground-rent, and having several Sons and Daughters, made his Will in April, 1696. "In respect of my worldly estate, I dispose of it as follows:—To my Son David I give £4 per annum of ground-rent (and in like manner he parcels out the whole £22 to his children (except eldest), his, her, or their heirs and assigns for ever); but as to *Ventris*, my eldest and undutiful Son, I give him, in hopes he may reform, £5 per annum, due on blank lottery tickets in the Million Lottery; and if any of my other children die, the legacy to go to the survivor, my said undutiful Son excepted, who is to have no share or part thereof, nor no more share than that I have before given him." Building leases having expired, the heir of *Ventris*, the eldest Son, brought ejectment, insisting that the reversion was undisposed of. The Common Bench held against him, and King's Bench confirmed decision: 1st, Because intention to pass all estate was plain from introductory clause, where he declares his Will was in respect of all his worldly estate, and that part where he says that his eldest Son was to have and no more. 2nd, The limitation to the younger children and their heirs, which cannot take effect if the interest is only during the continuance of the rent; and nothing is more common than for people to speak of their ground-rent when they mean the houses and lands out of which they issue. 3rd, The case of *Kerry v. Dethick* (*Moore's Reports*, p. 640) is express in point, and although it is said Defendants were advised to bring error, that does not impeach its authority. The next case is *Hopkins v. Hopkins* (1 Atkins, 589), where Lord Hardwicke lays down a principle which modern authorities have fully supported. In this case, Lord Hardwicke, speaking of the Testator, observed: "First he leaves his estate to Trustees and their heirs, to the use of them and their heirs upon several trusts hereinafter mentioned. These words were very properly relied on as declaring his in-

tention *that the legal estate so given* should be used to serve and support all the trusts and limitations after declared."

The next case is *Hill v. Bishop of Lincoln* (1 Atkins, 619, 620). There Lord Hardwicke observed:—"The general question on this devise is, whether there be a resulting trust or not? On the first hearing, I inclined to think that there was, but I have changed my opinion entirely. The general rule that where lands are devised for a particular purpose what remain after that particular purpose is satisfied *results* admits of several exceptions. If J. S. devise lands to A to sell them to B, for the particular advantage of B, that advantage is the only purpose to be served, according to the intent of the Testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent of a resulting Trust in such a case; nor is there any warrant from the words or intent of the Testator to say, this devise severs the beneficial interest, but is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A devise lands to J. S. to sell for the best price to B, or to lease for three years at such a fine, there is no resulting trust, so that the devise here amounts to no more than this: the Testator gives the advowson to Grace Smith, but if such a College will buy it, then he lays an injunction on her to sell, and therefore there are two objects of the Testator's benevolence—Grace Smith and the Colleges. Where there is a resulting Trust, the heir-at-law, after the particular purposes are satisfied, may compel the Trustee to convey to him, here he cannot; *in all events the heir is disinherited*. Or where the heir-at-law is entitled to a resulting Trust, he may by Bill compel the estate to be sold out and out; here he could not, if the Colleges should refuse to buy. This circumstance differs the case from all the cases put. The word *Trust* is not made use of, and if Grace Smith is a Trustee it must be by construction, and then the intent of the Testator must be chiefly considered as a guide to that construction, yet that must be where the intent of the Testator is apparent; but here willing and desiring are more properly words of injunction than trust."

Lord Hardwicke also referred to the case of *Cunningham v. Mellish* (Prec. Chy., 31), and observed it was a stronger case than this against the heir, for there the words *in trust* were used, it being a devise of lands to his Cousin A and his heirs, in trust to be sold for payments of debts and legacies, and the surplus held to be no resulting trust for the heir.

Lord Hardwicke further observed: "No general rule can be laid down unless where a real estate is devised to be sold for the payment of debts and no more is said, there it is clearly a resulting Trust; but if a particular reason occurs, *why the Testator should intend a beneficial interest to the devisee*, there are no precedents to warrant the Court to say it shall not be a beneficial interest."

The next case is *King v. Davidson* (2 Ves. & Beames, 272). There Lord Eldon observed: "Where the whole legal interest is given for a particular purpose, with an intention to give the devisee the beneficial interest, if the whole *is not exhausted the surplus goes to the devisees*, as it is intended to be given to them." Lord Eldon agrees with the principle laid down in *Hill v. Bishop of Lincoln*. (See also 1 Jarman on Wills, p. 530, 3rd edition.)

The next case is *Challenger v. Shephard* (8 Term Reports, p. 597). The marginal note is: "Where an estate is decreed to Trustees in trust for A B, without any limitation of the estate to the cestui que next, the latter takes the beneficial interest in fee."

Then comes *Knight v. Selby* (3 Manuing & Granger, p. 93). By a Will made before 1838, the Testator devised as follows: "As to my messuage lands and tenements and real estates, I dispose thereof as follows:—I give and decree Whiteacre unto A and B and their heirs to the use of C for life, and after her decease to the use of D and E as tenants in common. Held D and E took in fee.

Then comes *Moore v. Cleghorn*, 7th July, 1848 (12 Jurist, p. 591): "Devise to Trustees in fee upon trust for the use and benefit of A B, without any words of limitation of the estate to A B. Held that A B took the beneficial interest in fee.

Challenger v. Shephard (8 T. R., p. 591); Knight v. Selby (3 M. & G., p. 92), commented on and followed with observations of Lord Cottenham.

Then comes Smith v. Smith (3 Law Journal, 1861): "Estate in fee without words of limitation. A Testator by Will, made before Will Act, 1 Vict. c. 96, gave all his real and personal estate to Trustees in trust after payment of his just debts, and to convert the personal estate into money, to be placed at interest, and then, after giving all the profits arising from his real estate to his Wife, to be applied to her maintenance at the discretion of the Trustees, if she should need the whole of it for her life, the Testator willed that the Trustees should first put his kinsman, G. S., into possession of a close, called the 1st Close, and then devised as follows:—I give all that my close or piece of land called the 2nd Close, with all the appurtenances, unto my kinsman, W. S. Held that W. S. took an estate in fee, though the devise to him contained no words of limitation, there being a sufficient intention shown by the Will that the Trustees should take the legal fee conferred on them by the word 'estate' and hold it in trust for W. S."

The following is the judgment of Mr. Justice Williams:—"Plaintiffs relied on Jarman on Devises, c. 33, p. 247, 3rd edition, and the authorities there cited, to the effect that nothing is better settled than that a devise of lands without words of limitation occurring in a Will made before the new Wills Act confers on the devisee an estate for life only, notwithstanding that the Testator may have commenced his Will with a declaration of his intention to dispose of his whole estate, or the Will may contain an antecedent devise to the heir for life of the property which is the subject of dispute.

"The Defendants relied on Challenger v. Shephard (Knight & Selby, and Moore & Cleghorn), and contended, and rightly contended, we think, that those authorities establish the general rule that *wherever* an estate in fee is *devised to Trustees in trust* without any limitation of the estate of the cestui que trust, the latter takes the beneficial interest in fee, because in such cases everything which the Trustees take is

given *for the benefit of the devisee*, and there is no resulting trust for the heir. But the case of *Doe v. Kinker v. Cafe* (7 Exch. Rep., p. 675), shows that even where there is a devise expressly to Trustees and their heirs upon certain trusts, followed by a devise to A B, the Trustees take that quantity of interest only which is requisite for the purposes of the trusts, and A B takes only an estate for life. The legal fee is not requisite for those purposes.

"In answer to this authority, the Defendants insisted that Trustees in the present case take *the legal fee* by reason of the trust to pay debts; and we are of opinion, looking at the whole of the Will, that the Trustees do take the legal fee; for although the Testator's direction to them, after giving them all his real and personal estate to convert, after payment of his debts, into money, and perform the other principal trusts, might *per se* constitute only a charge of the debts on the real estate, yet we think this direction may, in the present case, be regarded as sufficient to indicate that the Testator meant the Trustees to take the legal fee conferred on them by the word 'estate,' and hold it, after the performance of the other trusts, in trust for W. S., to whom it is devised."

In the present case the authorities I have before given show that the entire interest is vested in the Trustees beyond all doubt. The authority of the above cases distinctly negatives any resulting trust.

I may add that *Sidney v. Shelley* (19 Ves. p. 352,) and *Hughes v. Evans* (13 Simons, p. 496), bear on this matter.

The first was a case in which John Shelley, by his Will, dated 5th April, 1728, devised estates in the county of Sussex to Trustees to hold to them, their heirs, and assigns, to and for the several uses, intents, and purposes after mentioned, viz., to the use of them, their executors, administrators, and assigns for the term of 99 years, without impeachment of waste, upon the trusts hereinafter expressed and declared concerning the same; and from and after the expiration or other sooner determination of the said term of 99 years, he gave the estate to the use of his Brother, Sir Bysshe Shelley, for the

term of his natural life, without impeachment of waste, with a limitation to Trustees during his life to preserve contingent remainders; with remainder to the use of Sir Timothy, son of Sir Bysshe Shelley, for life, without impeachment of waste; with remainder to Trustees, &c., and to the first and other Sons of Sir Timothy Shelley in tail male, &c.

The Testator died in 1790, without issue, leaving his Brother Sir Bysshe Shelley his heir-at-law, and not having made any declaration of the trusts of the term of years created by Will. Lord Eldon, in giving judgment, observed:—"The effect is, that he had created a legal estate in Trustees for a term of 99 years upon trusts to be declared, *none of which are declared*, and the question is, whether during that term the beneficial interest goes to the heir. If that is so, the effect of this Will and a supposed intestacy as to part of the estate, notwithstanding the Will, would be this: that Bysshe Shelley is, as heir-at-law, and by way of resulting trust, to take the beneficial interest in the estate for 99 years." The Lord Chancellor held that there was no resulting trust for the heir upon the apparent intention to give immediate estates subject to the term not future estates expectant on its determination.

The intention to disinherit the Plaintiff rests, not only in vesting the entire legal property in Trustees, with directions that they were to hold the real estate for the benefit of others, and that the Plaintiff was to take nothing under the Will or the trusts thereof, but he states the reason why no more should be given him, *as he had given him what he deemed sufficient in his lifetime*. But, in addition to all this, there is an absolute intention shown that, as long as any of his Brother's children existed, the Plaintiff was not to take.

Chief Justice Gibbs, in *Doe v. Cole v. Goldsmith* (7 Taunton, p. 209), observed that it was the Testator's evident intention that the estate should not go over till all the heirs of the body of his Brother's children were extinct.

Lord Tenterden, also, in the case *Doe v. Garard*, p. 380 (2 Jarman on Wills, 3rd edition), observed: "In this case, a Testator gave to his Nephew, J. G., all his lands, to have and to

hold during his life, and to his Son, if he has one ; if not, to the eldest Son of my Nephew, J. G., and to his Son after him, if he has one ; if not, to the regular male heir of the G. family. By Codicil, stating that his Nephew, J. G., then had a Son born, the Testator gave all his lands to that Son, after his Father's decease, and to his eldest Son, if he has one, but if he has no Son, then to the next eldest regular male heir of the G. family." It was held that by the Will and Codicil, the Son of J. G. took an estate tail.

Lord Tenterden, C. J., considered "that the Testator did not intend the estate to go over to the G. family while any issue male of his Great-nephew should remain."

The case in 13 Simons, p. 496, bears strongly against construing any trust in favour of the Plaintiff. There a Testator devised all his freehold estates to his most dutiful Nephew, E. E., upon the trust and uses following, *but did not declare any use a trust*, except as to one of his estates. Held, from the context of the Will and a Codicil thereto, that there was no resulting trust in favour of his Son and heir as to any part of his estate. The Son was consequently disinherited.

The Court, I respectfully submit, have apparently omitted also to consider the various decisions in India where a Father has disinherited his Son. His right to dispose of his entire estate is admitted by this decree.

The following are cases which bear on this subject :—

Deshereil's case, East's Notes, No. 124: a Will, giving the whole property to the third and fourth Sons, only requiring them to pay Rs. 10,000 to a Wife, and making no mention of the eldest and second Son, held valid. This was in 1780.

Durprarain Surmano, by his Will, discarded his eldest Son and third Son, and left the bulk of his property to his Sons by his second Wife in four equal shares. In 1813, an ejectment was brought on the demise of one of the discarded Sons ; defence was taken, and, on proof of Will, a verdict was entered for Defendant (Sir Francis Macnaghten, p. 349).

Goorochurn Mullick was possessed of large property, ancestral and self-acquired. One of his Sons, named Bissum-

ber, having displeased his Father, the latter made a Will, by which he left Bissumber a very small sum and disposed of the residue. It must be presumed, as the case was not brought into Court, that the Son took advice, and was satisfied he would fail in an attempt to set aside his Father's Will (Sir Francis Macnaghten, p. 350).

Russookloll Dutt v. Hurlaul Dutt, cited by Sir Thomas Strange, and decided in 1789. A Father of four Sons, and possessed of property both ancestral and self-acquired, having provided for his eldest Son and advanced to the three younger Sons, left the whole of what he possessed to the two younger Sons, to the disinheritation of the two elder. Sir William Jones and Chambers concurred in supporting Will. A report of the case is given by Mr. Montican, and it appears from such that there *was an ancestral house and land* as well as other property. In the leading Nuddeah case, reported 1 Sudder Dewanny Adawlut, p. 2, the Father did disinherit his younger children, and was supported by the Court, on great consideration.

The celebrated reference to the five Judges of the Sudder, and the concurrence of the three Judges of the Supreme Court, established the right of a Father who had Sons "to sell, give, or pledge, without their consent, immovable ancestral property situate in the Province of Bengal; and that without the consent of the Sons he can, by Will, *prevent, alter, or affect their succession to such property.*" This was a case where the Father did disinherit his Son, and the Son brought an action of ejectment to recover. The question before the Court on the first issue was, "Whether a Father could dispose of his ancestral property absolutely at his pleasure during the life of his Son. The 4th issue was, whether the acts of the Father regarding ancestral property could be questioned by his children." (See page 147 Montiriou's Precedents and Records.) Such doctrine has been uniformly followed, and never has been attempted to be contravened till the present case. That the right to will away property has been supported by this Honorable Tribunal in different cases. I may select one or

two. The Right Honorable Pemberton Leigh, in 6 Moore, I. A., pp. 344 and 345, observes, "that throughout Bengal a man who is the absolute owner of property may now dispose of it by Will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the judicial authorities in Calcutta, as well of the Supreme as of the Sudder Court."

Lord Justice Knight Bruce, also, in giving judgment in the case of Sreemutty Soorjeemony Dossee (9 Moore, p. 135), observed: "Whatever may have formerly been considered the law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established." The Court appear to consider that, by the Hindoo law, a party cannot be disinherited without an express gift of the property to another. By the Hindoo law as it stood previous to the Act 21 of 1850, the bare act of renouncing disqualified the party from succeeding. The Act itself does not repeal the entire law, but only so much thereof as inflicts forfeiture of property vested in the party; and I may admit, if there was no Will, that under the present law the party would succeed. The right of a Father to exclude a Son from inheriting property of which the Father is the absolute owner, is nowhere interfered with, and what has been done in this case was only carrying out the injunctions of the Hindoo law, which directs that no portion of the property should be given to a party so circumstanced. The Testator in the present case is not open to the reproach, which applies to many in our own land, of leaving his child without a provision, having allowed him £700 a year. In the present case, however, I will show, when I come to examine the disposition of the real estate, that the right to such property is absolutely vested in Joteendro Mohun Tajore, and that there is no portion of the real estate which is not directly conveyed by the Will to definite and distinctly named parties. In fact, that with reference either to the real or the personal estate, there is no intestacy whatever.

CLAUSES REGARDING THE REAL AND PERSONAL ESTATES.

Before proceeding to examine the construction the Court in their decree have put on the clauses in the Will, regarding alike the personal and real estate, I may as well place before the reader the particular clauses which bear on the subject. In the early part of the Will, the Trustees "are directed to collect and get in the personal estate," *and thereout* to pay the funeral expenses and debts, and such legacies as might be payable in the ordinary course of administration within one year from the time of his death, "and after paying the said funeral expenses, debts, and legacies, they were to sell and convert such estate into money, in trust to invest the same, or permit the same to *remain invested*, on good securities, with power to vary such. He then directs that the Trustees or Trustee, shall out of the interest, dividends, and annual proceeds of the said trust monies and securities, *pay* the several *annuities* (except the Rs. 1,000 a month for idols rescinded by Codicil) given by his Will, *and also* any legacies which should become or be payable after the said trust monies should have been invested, so far as the said interest, dividends, and annual proceeds *will suffice for those purposes*; and after payment of such annuities and legacies, do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the *person or persons* who for the time being shall, under the limitations and directions hereinafter contained, be entitled to the beneficial enjoyment of his real property or of the rents and profits or surplus rent and profits thereof. *And*, so soon as all the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said *trust monies and securities*, and the interest, dividends, and annual proceeds thereof; *in trust* ABSOLUTELY for the person or persons entitled, under the limitations and directions hereinafter contained, to the beneficial or absolute enjoyment of my said real property.

The Testator then proceeds to deal with his real property as follows:—"And as to such of my said estate as shall be

realty or immovable property, or of the nature of realty upon trust, until all my debts and legacies shall have been paid, and all the annuities given by this my Will shall have fallen in and been fully satisfied, to receive and collect the rents, issues, and profits thereof, and thereout, in the first instance, to pay such, IF ANY, of the said legacies and of the said annuities given by this my Will, *as my said PERSONAL ESTATE, or the annual income DERIVED FROM THE TRUST MONIES AND SECURITIES, AFORESAID, shall be inadequate to defray*; and to pay the residue of the said rents, issues, and profits which shall from time to time remain unexpended, after making such payments as aforesaid, unto the 'person or persons' for the time being to whom subject to the desire (it should be devise), hereinbefore made to my said Trustees) I HAVE GIVEN AND DEVISED THE SAID REAL ESTATE, *under the limitations hereinafter expressed*, for the absolute use of such person or persons respectively." Then comes the following important clause :—"I desire that my said Trustees or Trustee *shall hold the said real estate generally* for the use and benefit of such last-named *person or persons* for the time being, *so far as is consistent with the trusts and provisions by and in this my Will created and contained*." Then, after directing that out of the income which should remain, the expenses of the establishments in the Mofussil and Calcutta should be paid, he directs that the person or persons entitled to the beneficial enjoyment of the real property should receive Rs. 2,500 a month, and that the various legacies and annuities given by his Will should only be paid gradually, and as might be found POSSIBLE by the Trustees out of the balance which should remain after such last-mentioned payment. There was then a provision that 5 per cent. should be allowed on any legacy or annuity postponed until the same be fully paid and satisfied; "*and so soon as all the legacies and annuities given by this my Will shall have fallen in or been paid and fully satisfied, then in trust FORTHWITH TO CONVEY 'THE REAL ESTATE and premises'* unto and to the use OF THE PERSON who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, WITH AND SUBJECT to such and *the like limitations, pro-*

visions and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far, but so far only, as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force and apply to the real estate, or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

In a subsequent part of his Will, he states:—"I direct that each of the legacies and bequests, or shares, by me herein made, shall be deemed and taken to have vested in the several legatees to whom they are by me bequeathed immediately upon my death;" and he further directs that the legacy or share on the death of the respective parties was to go to their representatives.

I will now examine the construction the Court have put upon the clauses in the Will regarding the personal estate. The Court observe: "*The decision of the rights in the real estate involves the personalty settled therewith.*" There is, however, left the question, how far the personalty not settled with the realty, but to be made into a distinct fund by the Will AFTER THE LEGACIES AND ANNUITIES HAD BEEN DISPOSED OF, ought to be dealt with. Whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money in which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund and securities for money as a gift of the corpus to an uncertain person who might be one of those who, for failure of the estate in tail male, cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested, among others, the construction that the

person then in possession and his successors should take the entire income and profits without deduction, but he leant to the alternative that it was uncertain whether the Testator meant to make an absolute gift or only to give the interest in succession *reddendo singula singules*, and upon this ground he concurred in holding the gift to be void. The decree gives Joteendro Mohun Tagore the surplus of the interest remaining in the hands of the Trustees, after payment of the legacies and annuities, and excludes him and his successors from any right in the subsequently accruing interest, which is hardly consistent. The intention of the Testator, however, appears sufficiently clear to give effect to all the words as follows, viz. :—"That the surplus in the hands of the Trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same 'person or persons' as were in succession to take a beneficial interest in the realty, in the same manner as the rents of the realty." The words "or persons," instead of being rejected as inconsistent with a gift of the corpus, ought rather to be taken as conclusive, to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, *because there was only one conveyance to be made for the benefit of all*. The words "or persons," in the plural, were proper in the clause directing the Trustees not to convey, but to stand "possessed of, and interested in, the trust monies and securities, and the interest, dividends, and annual proceeds thereof in trust," absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the Will. The words "absolutely" and "absolute" are used *not to indicate that the whole was to go over together*, but that it was to be enjoyed free from the charges in

respect of legacies and securities. No person could be entitled to the "absolute" enjoyment of the real property under the Will in the largest sense, and "absolute" is classed by the Will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion is, "*that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the corpus remaining otherwise undisposed of.*" I search in vain for any passage in the Will to warrant such a finding. On the contrary, the Will directly contradicts it. The mistake the Court has fallen into arises from supposing that the fund spoken of is to be created after the payment of the debts, legacies, and annuities. This is a plain error, and arises from taking the words in the early part directing the debts and legacies to be paid in the ordinary course of administration within one year from the time of his death, and supposing that the direction to invest was the creation of a fund to *be created* after the debts, legacies, and annuities had been fully paid. The directing the Trustees out of the interest, dividends, and annual proceeds of the trust monies and securities, to pay the several *annuities* given, and *any legacies* which shall become or be payable *after the said trust monies shall have been invested*, so far as the interest, dividends, and annual proceeds will suffice for that purpose, *is decisive to show* that the fund was not to be created after the payment of the debts, legacies, and annuities. If the Testator had intended to create any trust fund for the purpose assumed by the Court, he would have specified the same, and directed the attention of the Trustees to it. The direction to invest, is the ordinary direction to Trustees to prevent large sums from being held in the hands of Executors unemployed.

In addition to all this, the Testator specifies what is to be done with the funds collected. First, they are THEREOUT to pay debts, funeral expenses and legacies, within one year ;

and then they are to invest. The time for payment fixes precisely the time of investing. The direction to pay within one year the debts and legacies is so far useful, as showing that no unnecessary delay was to take place in discharging them, and it is OUT of the sums so collected that such are to be paid. It is clear from other parts of the Will that such could not be paid within the year. After investing, the Testator directs that the Trustees do and shall, out of the interest, dividends, and annual proceeds of the said trust monies and securities, pay the several annuities given, and also any of the legacies which shall become or be payable after the trust monies have been invested, so far as the said interest, dividends, and annual proceeds will SUFFICE FOR THESE PURPOSES; and after payment of such legacies and annuities, to pay the surplus unexpended of the interest, dividends, and annual proceeds unto the person or persons who, for the time being, shall be entitled to the beneficial enjoyment of any real property, or of the rents and profits or surplus rents and profits thereof. And so soon as all the annuities and legacies have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust monies, and *securities*, and the interest, dividends, and annual proceeds thereof, in trust ABSOLUTELY for *the person or persons entitled to the beneficial or absolute enjoyment* of my said real property. The purposes for which this fund was to be applied are distinctly declared, and there is nothing to warrant the imported construction of the Court.

But the time fixed on by the Court for the creation of this new trust fund is singularly unfortunate, for this was the time fixed by the Testator when the Executors and Trustees had wound up the estate by paying all debts, legacies and annuities. What then remained for them to perform? The Will states it: they are to hold the monies and SECURITIES, and the interest, dividends, and annual proceeds thereof ABSOLUTELY for the person or persons entitled to the beneficial or absolute enjoyment of the real property.

But it does not stop here; the Testator having directed them to hand over the personal estate, proceeds to direct the Trustees, on the legacies and annuities being fully paid FORTH-

WITH, to convey *the said real estate* and premises to the use of the person entitled to the beneficial interest therein. The delivering over the monies and securities was to precede their giving up charge. It was on the full payment of the debts, legacies, and annuities, that they were to deliver over the property both real and personal.

The words "or persons," the Court say (speaking with reference to the personal estate), instead of being rejected as inconsistent with the gift of a corpus, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest.

But now let me examine the sentence in which this direction is contained. It is this: "that so soon as all the annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust monies and *securities*, and the interest, dividends, and annual proceeds thereof, in trust *absolutely* for the person or persons entitled to the beneficial or absolute enjoyment of my real property." Taking this clause away from the various cases I have above given, which are dead against the construction contended for by the Court, by showing the direct vesting of the interest, let me examine this sentence by plain and ordinary construction. It says, "when the legacies and annuities are all paid, the monies, *SECURITIES*, interest, dividends, and annual proceeds thereof are to be held absolutely for the person or persons entitled to the beneficial or absolute enjoyment of my *REAL PROPERTY*." If, at the time specified, Joteendro was the person entitled, he would take the entire property, for the word "*absolutely*" has reference to the *WHOLE OF THE FUND*, and not merely the interest accrued. It is not a gift of the interest of a fund to one after another, but a gift of the *whole securities* to the party answering the description at the time when such funds were to be delivered over or held for the party entitled. If the construction of the Court were correct, the Trustees would have been directed to pay the interest of the trust funds in succession to the parties entitled to the beneficial enjoyment of the real estate. The direction in the Will, that

the various bequests and legacies shall be deemed vested interests, is a technical expression, and must receive its usual construction. The authorities cited by me are absolutely decisive on this head. Not to weary the reader, I may refer generally to them from page 284 to 290.

When property is given either for one or another answering a particular description at a given time, it is surely not intended for both. The receipt of either was not limited to receiving the interest alone, but was an absolute gift of the monies, *securities*, and produce of the same. It will not do attempting to explain away the word *absolutely*, for that applies to the entire property, and not the mere interest produced.

The Court appear to assent to the view taken by Mr. Justice Norman, of the expression "person or persons" in the clause regarding the personal estate, and he considered the case in 4 Ves. 649, *Lowndes v. Stone*, as resembling the present. He then goes on to say, that if the true construction is that the gift is an absolute gift of the whole fund to the person who may be entitled to the rents of the real estate at the time when all the legacies and annuities shall have been paid off, the gift is bad for uncertainty.

This is a mistake which I may again notice. The Chief Justice in the Court below, held that the bequest of the personalty to Joteendro was void on the ground of the contingency being too remote. He fell, as we all occasionally do, into error. The error was in supposing *Bagshaw v. Spencer* was law, and secondly, in affirming that the gift to Joteendro was given on a contingency which was too remote, instead of being vested in him. The resemblance alluded to by Mr. Justice Norman is in truth no resemblance at all. The Master of the Rolls in *Longmore v. Broom* (7th Ves. 124), explains this: "A bequest to A or B is void, but a bequest to A or B at the discretion of C is good, for he may divide it between them." In this case, there is no uncertainty at all. I am now looking at this matter in the way it has been put, independent of its being considered a vested interest. Taking the matter in this view, the Trustees are directed to hold the monies, *securities*,

dividends and interest accrued, for whom? For the person or persons entitled to the beneficial enjoyment of the rents at the time when the legacies and annuities are paid. In this point of view, if Joteendro had died in the lifetime of the Testator, the next in succession would take. The Trustees were directed to hold absolutely for the person or persons entitled. Now, whether such was vested at once or was dependent on the contingency of Jeteendro's being alive at the time when the legacies and annuities were paid, would be equally unimportant, because being liable to be divested on such a contingency would not defeat the vesting itself.

The Court appear to hold that the construction they declare regarding the personalty is to follow what is declared regarding the real estate. This I shall examine presently. It was the clear intention of the Testator, as I will hereafter show, that the Trustees were to convey *the entire real estate to the person entitled to the enjoyment of the beneficial interest* in the rents and profits, subject to the limitations in the Will mentioned, and if such failed under the present Will, Joteendro takes the entire real estate.

If Joteendro made himself out to be the person entitled, even at the time when the legacies and annuities were paid, he took the entire interest, for the Trustees were to deliver over both the real and personal estate.

It is of no importance, with reference to the personal estate, whether the word "persons" be retained or not. If the word remain, all that we have to do is to show that either at the time of the death of the Testator, or at the time when the legacies and annuities were paid, that we answered the description.

The entire line of authorities, cited by me previously, show that it was a vested interest in Joteendro, and that even if there was delay in making over the securities, that attached to time of possession and did not vary the gift.

So far from the Court's construction being a correct one, even the Chief Justice, Sir B. Peacock, admitted that Joteendro was to take the entire interest in the personalty in the event of the legacies and annuities being paid in his life-

time. In opposition to the construction held by the Court, I may observe that the entire interest in the estate, real and personal, had been previously vested in the Trustees and Executors in trust; and that after investing the personal estate in securities, on the payment of the legacies and annuities, they were to stand possessed of and interested in the said trust monies AND SECURITIES, and interest, dividends, and proceeds thereof, in *trust absolutely* for the person or persons entitled to the beneficial or absolute enjoyment of the real property. The matter explains itself: holding all the estate, real and personal, in trust, they were, on the payment of all claims, to hand over not the interest alone, but all the securities and monies to the person entitled. Whether the word "persons" was rejected or kept, Joteendro answered the alternative.

It is singular that the Court say very little regarding the real estate, though very important and grave considerations arise regarding this. I find in their decree the following words which have reference to the real estate:—"The residue to go in aid of the income of the personal estate, which is first to be applied to the payment of legacies and annuities which are to be paid gradually, and as may be found possible." The Court have therefore declared that the invested fund was to be held in trust for Joteendro and others, and that the rents of the real estate were to be applied in aid of the income of the personal estate in payment of the legacies and annuities. The necessary effect of the original decree of the High Appellate Court and the present decree is to cripple the *powers of the tenant for life*, and to postpone the payment of the debts, legacies, and annuities, till the income of the trust fund, assisted by the rents of the estate, should be enabled to discharge them. This is what I understand as the consequence of their decree. This could never be intended by the Testator, and it is in vain to attempt to support such a charge on the real estate, for the Testator *has distinctly declared* that the real estate *is only to be liable* to pay such of the legacies and annuities "as my personal ESTATE, or the annual income derived from the trust monies and securities aforesaid, shall be INADEQUATE TO PAY," clearly

showing that the invested fund and the interest thereof were to be applied before the real estate could be touched. This I have already examined from pages 279 to 303."

The opinion of that great Judge, Lord Eldon, in the case of *Bootle v. Blundell* 1 Me. (v. 232), is decisive against such a construction. The Court, in their decree, exempt the body of the personal estate from liability to the debts, legacies, and annuities, and direct the rents of the real estate, along with the interest of the invested fund, to be applied in liquidation of the debts, legacies and annuities. But this is giving an interpretation of the Will which cannot stand a moment's examination. One clause, and one clause alone, in this Will regulates the manner in which the rents of the real estate are to be applied.

In only one instance are the Executors allowed primarily to touch the rents of the real estate, and that is, in the case of the "Tagore Professorship." So far from such invested fund not being liable to be touched, the Trustees are told to take such a sum of money as would produce Rs. 1,000 a month, and to take such from his personal estate or from the rents and profits of his real estate. I pointed out that if the real estate under the terms of the Will was not liable, that the construction maintained by the Court below was liable to this objection, that the legacies and annuities never could be paid at all. I put this dilemma to show that the Testator must have necessarily intended that the personal estate as well as the income would be applied to pay the charges. Now, the permission to take the amount of the Tagore Professorship (2 lacs and 40,000 rupees) from the personal estate was not allowed for the purpose of postponing indefinitely the payment of other legacies. The large legacy of 60,000 rupees and 3 lacs to the six Grandsons were to be paid as soon as conveniently *might be* after the Testator's death. In addition to this, he directs his Executors to pay his debts and such legacies as might be payable in the ordinary course of administration *within one year from the time of his death*. The reason why this option was given to the Executors as to taking the fund from

either the personal estate or the rents of the real property, arose from the anxiety of the Testator immediately to establish such Professorship. It is utterly impossible to maintain, with any pretence of reason, that the income of the invested personal estate, aided by the rents and profits of the real estate, were alone to be employed in the payment of the debts, legacies, and annuities, for such would contradict the whole scope of the Will. In addition to such a remark, the Testator, after qualifying the right to use the rents and profits of the real estate, directs the Trustees to collect the rents, issues, and profits of the real estate, and *thereout*, in the first instance, to pay *such, if any*, of the said legacies and annuities given by my said Will, as my personal estate, or the annual income derived from the trust monies and securities aforesaid, might be inadequate to defray. By the words *if any*, it is clear that he contemplated that a great part of the legacies and annuities would have been previously discharged. The Executors were directed, *on payment* of the debts, legacies, and annuities, to hand the funds over to Joteendro. What is the common sense of this matter? The Testator wished to place this young man at the head of the family, and to give to Joteendro's Son an estate according to the order of primogeniture. He directs the Executors to pay the legacies and annuities, and when they have done so to hand over the balance of the fund to Joteendro. The Court have expressly declared that he is the party entitled to the beneficial interest in the estate. For what purpose other than for the payment of the debts, legacies, and annuities was the fund created? For no other purpose whatever—except by importing matters into the Will utterly unauthorized by the Will itself.

If the Testator had wished that the invested fund was to remain for the benefit of parties who might come into existence, he would have stated so. The trust is for payment of debts, legacies, and annuities, and *as soon as such were paid*, or had fallen in, they were to hold absolutely for the person or persons entitled to the beneficial or absolute enjoyment. If

the principle maintained by the Court were true, supposing the debts, legacies, and annuities had been paid in the lifetime of Joteendro, there could be no delivery over of the funds; but this is manifestly contrary to his plain and declared intention. By the vesting clause, by the gift of the surplus income, by being the party entitled to the beneficial enjoyment of the real estate, he is brought within the very words of the Will. The holding of the Court contradicts the whole line of the cases given by me in a former part of my remarks: authorities not founded merely on English law, but on the intention of the Testator. Supposing even that the amount was to go over to the next party taking the beneficial interest in the real property in existence at the time when the debt, legacies, and annuities were paid, that contingency even would not divest Joteendro's right, unless he should die before the contingency happened. It was not to be a continuous trust after the debts, legacies, and annuities had been paid or fallen in; *then* their trust was to cease, and they were to convey alike the real estate, and deliver over the fund and securities, to the party who answered the description at the time the funds were to be made over. In this case, the gift to one or another party at a given time is not a gift in succession to both, but is an absolute gift to the party answering the description. Even looking at the matter as a contingency instead of being a vested interest, the question would simply be who, when all was paid, was the party beneficially entitled? The answer is, Joteendro.

If I be right in supposing that the real estate was only to be held liable in the event of the *personal estate*, or the income of the invested fund, being insufficient, the decision of the Court below, and that of the Appellate Tribunal, are necessarily erroneous. The supposition of the Court, that the Testator intended to create a fund which was not to be touched, is inconsistent with the liberty given to take from such invested fund *immediately* the large sum of 2 lacs and 40,000 rupees, which would be required for the Tagore professorship.

If the personal estate had been applied as directed by the

Testator in a due course of administration, and the real estate were held liable only as a deficiency of the personal estate, or its income, to pay the debts, legacies, and annuities, it would have been a matter in which Joteendro would have had no particular interest, because the personal estate would not be sufficient to discharge the legacies and annuities given.

The direction to hold the personal estate as a trust fund is injurious, as postponing the payment of the legacies and annuities for years—an injury to the tenant for life which could never have been contemplated by the Testator. Instead of this invested fund being created for the purposes declared, the payment of debts, legacies, and annuities, the Court hold it to be created for a purpose *not declared*, with this attendant effect, that of delaying the payment of such debts, legacies, and annuities, and crippling the hands of the tenant for life.

It will not do, in reason and justice, to attempt to get rid of plain language. When a man directs that the monies, *securities*, and interest accrued *are to be held absolutely* for a person or persons answering a particular description at a given time (being the time fixed for delivering up the estate), it is not a trust to pay the interest *alone* to parties in succession, but a direct gift of the entire fund. For what earthly purpose could such a fund be created? For what object maintained? The income of the estate at present is 3 lacs a year; the Testator states it at $2\frac{1}{2}$, *steadily increasing*. It is quite clear from the whole Will, that the personal estate was insufficient for the payment of the legacies and annuities. It never could be the Testator's intention to keep his favourite Nephew out of the enjoyment of his life interest in the real estate; yet this is the necessary effect of the Court's holding that a trust fund was to be created after the payment of the legacies and annuities—an intention nowhere even hinted at by the Testator. What the Court say is, that the parties each in succession are to take the interest for life of such trust fund. We do not know exactly what the amount of the personal estate is, but it cannot be very large if the 2 lacs and 40,000 rupees have been taken out for the Tagore Professorship.

Speaking hastily, it would scarcely leave 2 lacs remaining ; and this would merely give a trust fund of 800 rupees a year for each successive recipient. For what purpose should he create a fund with a provision restricting the party from applying the personal estate to the payment of charges, when he leaves the tenant for life to spend the 3 lacs a year as he chooses. The assumption of the Court seems entirely unsustainable.

The Court in their judgment, speaking of the real estate, observe : " Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male can be read or deduced from this Will."

This statement appears to me deficient in accuracy. The entire estate of the Testator was vested in fee in the Trustees, and that interest was not limited by the life interests or estates in tail, but extended *to the reversion also*. The Trustees were directed to convey the entire interest, not a part. It will be seen that the Court have entirely overlooked this. The only other passage in which they attempt to deal with the real estate is as follows:—"The word person, in the singular, is used in the clause directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all." The following is the clause in the Will:—"And so soon as all the legacies and annuities given by this my Will, shall have fallen in or been paid and fully satisfied, then in trust *forthwith* to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, subject to the like limitations, provisions, and directions as are hereinafter declared and expressed." This is a plain and positive direction, and, as is observed by the Master of the Rolls in *Jones v. Colbeck* (8 Ves. p. 42), it is not to be controlled by inference or argument from other points of the Will.

But now let me see what is the legal import of the words "real estate, and premises," as used by the Testator.

In *Nicholls v. Butcher* (18 Ves. p. 195), the word "estate" in a Will, imports the *absolute property*.

In *Church v. Mundy* (15 Ves. p. 396), it was admitted in argument that the words "real estate" would be sufficient to pass freehold but not copyhold estate. Lord Eldon, however, held that the words "real estate" conveyed the reversion in both.

In Mr. Roberts' able work on the construction of Wills (Vol. I. p. 410, 3rd ed., 1826), he observes:—"The word 'estate' is a word of great compass; predicable of every species of property, corporeal or incorporeal, real and personal. It may also embrace every description of interest; and so far is it from being necessary in a Will to add words of inheritance in order to make it pass a fee, that words of restraint must be added, or specific grounds for inferring a narrower intention in the Testator must be shown, to make it impart less than the fee, where the fee is disposable." Mr. Roberts, at pp. 412 and 413, Vol. I. 3rd ed.) points out the various cases in which the word "estate," or "estates," in a Will had been held to convey the fee, and at p. 413, observes: "It is not surprising, therefore, that after these decisions the Court of Common Pleas should have interposed in a very late case to save the counsel the trouble of arguing that a devise of all my estate at Ashton passed the fee simple." *Chichester v. Chichester* (4 Taunton, p. 176).

The Court have fallen into what appears to me an error, in supposing that no estate of inheritance has been created by the Will other than the void estates tail. Mr. Roberts explains this very clearly at p. 210 of his first volume, 3rd edition, 1829. He observes:—"A fee simple may be in possession or out of possession, and it may be out of possession by being turned to a right, in which case it has been before shown to be not devisable; or it may be out of possession by the interposition of some estate or interest of another, whereby the right of actual or immediate enjoyment is suspended; and this is when it takes the name of a reversion or remainder, either vested in interest, or limited to take place upon some contingent condition or event which

renders its vesting a matter of doubtful expectation." Then, after alluding to Leonard Lovie's case (10 Rep., 78A), he observes :—" The same reasoning holds with respect to a remainder upon an estate tail, which is also devisable within the above statutes. They both come within the descriptive terms used therein, the *reversion being an estate in fee, and a present interest*, though detached from the possession by the particular estate which has been carved out of the fee; and the remainder being that which is parted with at the same time with the particular antecedent estate, and is limited over to take effect in succession." A devise even of *lands* will convey the reversion, as in the case of *Rooke v. Rooke* (p. 461, 2 Vernon, by Raithby), where J. S., seized in fee, devised Blackacre to A for life, and devised to C all his lands not before devised, to be sold, and the money to be divided among his younger children. The question was referred to the Judges of Common Pleas, and they unanimously certified that the reversion was well devised, and it was decreed accordingly.

In Mr. Hawkins's work on the construction of Wills, pp. 33 and 34, under the title of " Reversionary Interests," it is stated that a devise of " lands," " real estate," &c., includes reversionary interests of whatever description, and he cites the above case of *Church v. Mundy* and *Ford v. Ford* (6 Hare, 486), and after a few lines, he remarks :—" It is now settled that a reversion in fee will pass under a general devise, unless a clear intention to exclude it be shown, though it is limited in part to the same uses to which the particular estate (if I may so call it) is already dedicated " (per Lord St. Leonards, *Tennent v. Tennent*, 1 Jo. and Lat. 389).

Supposing even that the present clause merely conveyed the remainder or reversion expectant on the determination of the previous estates, it would still be directly opposed to the finding of the Court. In a case before Lord Hardwicke, a Testator devised : " I give to my Son C. G. the reversion of the tenement which my Sister now lives in, after her decease, and the reversion of those two tenements now in the possession of J. C." Lord Hardwicke declared his opinion that the word

reversion passed the fee (*Balis v. Gale*, 2 Ves, 78). "The interest," said his Lordship, "which the Testator had in it was the reversion in fee, which he had in himself expectant on those leases which he had granted, whether for life or for years. '*Reversion*' was the right of having the estate back again, when the particular estate determined; it was descriptive of the right of reverter, by way of eminence which was in himself; consequently, there was no ground to split or divide it. Giving the reversion was giving the *whole* reversion, unless words are added limiting and restraining the interest." (See *Roberts on Wills*, p. 465, Vol. I., 3rd ed., 1826.)

Mr. Jarman also, at p. 255 of his second volume, 3rd edition, observes:—"It has long been established that a devise of a Testator's '*estate*' includes not only the *corpus* of the property, but the *whole of his interest* therein, and the same effect has been given to the word '*estates*' in the plural number, and it is now settled that the word '*estate*' will carry the inheritance, though it be accompanied by words of locality, or other expressions referable exclusively to the *corpus* of the property."

Mr. Jarman refers to a number of cases supporting his observations, with which I need not trouble the reader. Even the word "premises" in a Will has been allowed to carry the reversion. (See 1 East's Reps., p. 466, *Doe & Biddulph v. Meakin*.)

Mr. Jarman also, at p. 630, Vol. I., 3rd edition, speaking of a particular time, observes:—"Since this period, in every instance in which the question, whether the reversion passes by a general devise, has been agitated, it has been decided in the affirmative; and though in all these cases there happened to be other real estate to which the limitations inapplicable to the reversion might be referred, yet little or no stress seems to have been laid on this circumstance, and they were decided on the broad ground that, the words of the devise being sufficient to comprise the property, it would pass, without going into the question whether the Testator could be supposed to have had it actually in his contemplation when he framed the devise or not.

"The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the Testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the Testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question ; and that, too, whether the Testator had at the time of the making of the Will any other real estate to which such inapplicable limitations or purposes can be applied or not." (*See* 6 Hare, p. 494, where Wigram, V. C., cites and approves of the above remarks.)

The present case stands clear from any possibility of exception being made to the general meaning of the words "real estate and premises." Mr. Jarman, at page 691, Vol. I., 3rd. edition, refers in commendatory terms to a judgment delivered by Lord Brougham in the *Mayor of Hamilton v. Hodsdon* (6 Moore's, P. C., p. 76), where a Testator directed any shares he might have in a vessel be sold "for the benefit of his estate;" and after making some specific devises of "houses and lands," in some of which the fee was not exhausted, and bequeathing to his Wife certain specific chattels "which she had from her Father's estate," he gave "all the remainder of his estate that was then in his possession or might thereafter be his" to his wife; and directed "his estate," after payment of debts and legacies, to be "kept together" until the time appointed for "dividing" it, and declared his Wife entitled, in a certain event, to one-third of "his personal estate." It was argued that the trusts and purposes of the Will showed the Testator's mind to be directed to the personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term estate. Lord Brougham observed (in effect) that "estate meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty upon which the term could operate; that when realty was meant to be excluded, the expression *personal* estate was used, and that the Will was to

be construed *reddendo singula singulis*, by which method all parts of it became consistent, so that there was not that clear intent on the Will to restrict the meaning of the term estate which *was necessary* to prevent its material operation in comprising realty as well as personalty. *The unexhausted reversion was therefore held to pass.*" I may also refer, with reference to the interpretation which has been given to the word "estate," to the judgment of Mr. Justice Williams, in *Smith v. Smith*, which I have set out in my remarks on a Father's power to disinherit a Son.

The principle which would apply to the present direction to convey "the real estate and premises" is well illustrated in the case of *Booth v. Booth* (4 Ves. 408 and 409). There the Master of the Rolls observed, agreeing with the opinion of Lord Mansfield, "that when the whole property is devised, with a particular interest given out of it, it operates by way of exception, out of the absolute property." And again, "where an absolute property is given by Will, and a particular interest given in the mean time, the rule is that it does not operate as a condition precedent, but as a description of the time when the remainder is to take in possession." Mr. Fearne also, at p. 546 of his Vol. I., edition 1844, remarks: "But here we are to attend to an observation that where an absolute property in lands is given, and a particular interest in the mean time, until the devisee comes of age, the particular interest operates only as an exception out of the devise, which is so made subject to it; and such limitation is not considered as a condition precedent, to make the subsequent devise contingent upon the event of such devisee's coming of age, and so make it an executory devise, but is only taken as a description of the time when the devisee is to have possession; and the estate rests in him immediately, subject to such particular interest."

In the present case the entire estate is to be conveyed to Joteendro. This direction is not confined merely to estates for life or in tail, but extends to the reversion also.

The same principle is explained by Mr. Jarman. At p. 137 of Vol. I., 3rd edition, he observes:—"A revocation by alienation

may be either partial or total. A simple case of partial revocation occurs where a Testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise *pro tanto* by subtracting or withdrawing the demised interest from its operation, but the devise is no further disturbed; and consequently the devisees would, even under the old law, still take the inheritance, subject to the terms and, as incidental thereto, the rent, if any, reserved by the lease. So, if a Testator, after devising lands in fee, conveys them by deeds to the use of himself for life, with remainder to the use of his Wife for life, as a jointure, without disposing of, or in any manner assuming to convey, the inheritance, the conveyance would revoke the *pro tanto*, and the reversion in fee, expectant on the decease of the Testator's Wife, would pass under it to the devisee."

The present case is stronger than the case of *Avelyn v. Ward*, for *Mr. Fearn*, at p. 237 of Vol. I., edition 1844, after alluding to the observations of Lord Hardwicke, that if a precedent limitation were out of the case, the subsequent limitation should take place, remarks: "The said case of *Avelyn v. Ward*, and indeed most of the cases which occur upon this point, were cases wherein the whole fee was first limited;" and he then proceeds to state "that if such a conditional limitation is not defeated by the failing of the preceding estate in those cases wherein the whole estate is first limited, *a fortiori*, it should not be defeated in the cases where the whole fee is not at first limited, but the remainder, though conditional, includes the residue of the estate not before otherwise disposed of." Though the observations of this able writer would apply even to cases of conditional limitation, they are not required in the present case, for the direction to convey what remained of the interest vested in the Trustees to Joteendro is interfered with by nothing. If even the conveyance to Joteendro was dependent on the contingency of his being alive at the time when the debts, legacies and annuities were paid, that even would not prevent the vesting subject to such contingency.

(See *Skey v. Barnes*, 3 Mer.'s Rpts, p. 340; see also 1st Fearn, p. 247, edition 1844, note (k).) The giving an interpretation according to the plain and natural meaning of the words, which are *unequivocal*, carries out the intention of the Testator. A due attention as to what was to be conveyed by the deed conveying, will show that the attempt to explain the word "person" by the fact "that there was only one conveyance to be made for the benefit of all," cannot stand a moment's examination. The word "person" has no reference to a conveyance, but to a man. The Court itself have declared Joteendro to be the person entitled to the beneficial interest in the real estate, and this is plainly supported by the Will itself in the clause regarding the Idols. (See p. 118, section of Will 13.)

The Court have given no meaning to the clause above stated. If half-a-dozen conveyances were required, what earthly connection would such have with the interpretation of so plain a clause, which directs the Trustees to convey the *real estate and premises* to Joteendro? The direction is to convey his *entire interest*, and not *merely* life and estates in tail. The clause directing a *conveyance* was in itself, from the mere definition of the terms "*real estate and premises*," a positive direction to convey his entire interest, subject only to the determination of the preceding estates. This is the case of a Hindoo, an inhabitant of Calcutta, living under the protection of the English law, having his Will drawn by English lawyers, and attested by two Barristers and his Attorney. By English law, the clause in question would, *beyond all doubt*, convey to Joteendro a vested remainder in fee expectant on the determination or failure of the preceding estates; whether you call this a remainder or not, the interest remaining of the property after the life estates and estates tail, is distinctly given. If this clause is to be discarded, and it can only be discarded by interfering with plain and clear expressions, the declared intention of the Testator will be defeated.

The facts regarding this passage in the Will may be explained in a few words. The Testator, as is admitted by the Court, devises life estates and estates tail according to the law

of primogeniture. Such would not expend his interest in the real property devised. After vesting his entire estate in the Trustees, he directs them to hold his real estate generally for the parties to whom he HAD GIVEN *and devised* his REAL ESTATE. Now, life interests and estates tail would not convey the entire "*real estate and premises*." The reversion on the failure or determination of the same would remain. We must look elsewhere for anything that would convey the reversion, and we find it in the following passage :—"And as soon as all the legacies and annuities shall have fallen in, or been paid and fully satisfied, then in trust *forthwith* to convey the *real estate and premises* unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, subject to the limitations, provisions, and directions hereinafter contained and expressed." Nothing can be plainer, clearer, or more definite than this—vesting the entire remainder in Joteendro, and thus carrying into effect what he expressly states he had done—giving the entire real estate to the parties alluded to.

Whatever questions might arise with reference to residue and remainder as ordinarily used in residuary clauses, no question can here arise with reference to the interpretation of the words "*real estate and premises*" as used in the present Will.

The Court have apparently overlooked the legal and established import of the words "*real estate and premises*." There is an observation of Mr. Roberts' which is peculiarly pertinent here. After having pointed out the construction of the word "estate" in a Will, at page 466, Vol. I., 3rd edition, 1829, he observes :—"The cases where the word 'estate' has occurred in the residuary devise are improper examples of the devising residuary words, since that term, of *itself*, embraces the absolute fee simple in a Will." In the present case, at the very least, the above clause is an absolute grant of the reversion ; for passages in the Will show clearly that the Testator intended all his "*real estate*" should go to the parties alluded to.

The Testator, after directing that the surplus income of the

personal estate was to be paid to the person or persons for the time being *to whom* (subject to the desire (devise it should be) herein before made to my Trustees) *I have given and devised the said real estate* under the limitations and directions hereinafter contained and expressed, for the absolute use of such person or persons respectively.

He then directs the Trustees to hold the *real estate generally* for the benefit of such parties.

Now, before I turn to the passage where he directs the Trustees what to do on the debts, legacies, and annuities being paid, let me see, at least, what the Testator declares. He states that he *had given and devised his real estate* to certain parties (such, by no possibility, *could* refer to the Plaintiff). Did that refer to a limited interest, or to his entire real estate? Undoubtedly to the entire extent of his interest. What were the Trustees to do? He has stated it:—"When the legacies and annuities have been paid and satisfied, their trust was FORTHWITH to convey the said *real estate and premises unto* and to the *use of the person* who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to the limitations and provisions hereinafter contained and expressed concerning the said real estate."

The word "estate" itself shows the interest which is to be conveyed.

How the fact of executing a conveyance for the benefit of all the persons entitled interferes with the express direction to convey the estate to the "person" entitled to the beneficial interest *subject to the limitations directed to be conveyed*, is for others to explain; I cannot.

In the case of *Malin v. Keighley* (2 Ves. J., p. 335), the marginal note is that a Testator, by showing his desire creates a trust, unless plain words, or necessary implication, *shows there is to be a discretion to defeat it*. The Master of the Rolls in this case observed: "I will lay down the rule as broadly as this: whenever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire ex-

pressed is to be controlled by the party; and that he shall have an option to defeat it." And a little further on he observes: "If a Testator shows his desire that a thing shall be done, unless there are plain express words, or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust." In the present case the language is peremptory, and cannot be defeated.

I have already examined the clauses regarding the personal estate. With reference to the real estate there is no intestacy whatever; for not only is the entire estate, real and personal, vested absolutely in the Executors and Trustees, but they are directed to hold the entire real estate generally for the benefit of the person or persons entitled to the beneficial interest, so far as is consistent with the trusts and provisions in his Will created and contained. And after the debts and annuities have been paid, they are to convey the same, after providing for the directions and limitations mentioned, to the person entitled to the beneficial interest in the real estate. It conveys to Joteendro the absolute interest in the whole estate, subject to the various life interests and estates tail in the Will directed. The Court do not notice the fact that the reversion had to be conveyed. The Trustees were directed to convey the entire estate, and not merely life interests and estates tail. In any way of looking at this clause, Joteendro would take the entire interest, subject to the life and entailed interests. With reference to the present decree, if even Joteendro only took the reversion, the Court having declared the limitations in the Will, with the exception of his life estate, to be void, Joteendro would take, under this particular clause, the entire interest, and this is the declared intention of the Testator.

The Court, in the case, regarding the personal estate, held by the words of the Will, and insisted that the word "persons" should be retained; to this I had no objection, as I have above shown. They are now actually defeating a plain direction to convey the estate to the person entitled to the beneficial interest in the real estate *after providing for the various limita-*

tions directed, by assuming that the word "person" was used *because there was* only one conveyance to be made for the benefit of all. I do not see how such attempt at explanation assists the decree. What sort of exposition is that which not only defeats the plain intention of the Testator, but gives an estate to a person disinherited by him? When the Trustees are directed to convey, they are assuredly directed to convey the interest which is in them. Why do the Court not explain what was to become of the reversion existing in the Executors and Trustees? They omit to do so. If even the reversion was given for the benefit of all the parties named, the Plaintiff at any rate would be excluded; but that is not so; the real estate generally was to be held according to the directions and limitations for all. But the Testator, after directing the Trustees to convey the respective rights to the parties according to the limitations in the Will, directs that the estate should go to the party entitled to the enjoyment of the real estate. The decree declares Joteendro to be that person. The Court are, in fact, saying that because a conveyance is to be made securing the rights of all, that the positive direction to *convey* the real estate to the party entitled to the beneficial interest in the real estate is not to take effect at all. The construction I am contending for carries out the plain intention of the Testator. The construction the Court put defeats it. The Testator having vested the entire interest he possessed alike in the real and personal estate in the Executors and Trustees, directs them to convey the real "estate and premises;" this is a plain legal expression, perfectly good in law, and carries the entire interest, and is not limited to life estates and estates tail, but comprehends the reversion also. It would at least convey the reversion after the expiration of the life interests and estates tail, and consequently would be a complete answer to the Plaintiff's claim. According to the Will of the Testator, it is more than a residuary clause, for it directs the whole estate to be conveyed to Joteendro, subject to the limitations and directions in the Will mentioned. The Court having declared the whole of such limitations, with exception of his life interest,

void, Joteendro takes the entire property. If even the limitations had been held good, the remainder of interest would be the reversion.

The case of *Church v. Mundy* (15 Ves.), which I have quoted, was a case where the words "real estate" were used. It was held by Lord Eldon that the words "real estate" conveyed the reversion alike in freehold and copyhold estates. The remarks of that great Judge should ever be remembered. He observes: "I am strongly influenced towards the opinion that a Court of Justice is not by conjecture to take out of the effect of general words property which those words *are always considered as comprehending*. The cases, upon the effect of general words as applying to rents and profits not disposed of, as in *Hopkins v. Hopkins*, or TO A REVERSION, altogether unlikely to fall into possession, have gone upon this: that it is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the Testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend the subject that falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, where, as there is no other subject to which they can be applied, the Testator must, if he does not mean that, be considered as having no meaning."

This decision appears to me to maintain that a Court has no right to get rid of plain and unequivocal language.

The same principle was laid down by Lord Alvanley, in *ex parte* the Earl of Ilchester (7 Ves. 369); and applied even to cases where the Testator might not have contemplated the event. Lord Eldon must have approved of such principle, from the manner in which he speaks of Lord Alvanley's judgment. The doctrine laid down in *Church v. Mundy* was not a new doctrine, for in a preceding case Lord Eldon applied such general words *even to trust estate*. At page 435, in *Lord Braybrooke v. Inskip* (8 Ves.), Lord Eldon observed: "I am disposed,

in the case, to concur with the opinion of the Master of the Rolls; meaning rather to state my judgment, that the rule is not that in every case where general words are used the property shall or shall not pass; but that in each case you must look at every part of the Will for the intention with regard to such property. I do not know, in experience, any case in which the proposition is laid down so strongly, one way or another, as is laid down in the *Attorney-General v. Buller*. I know of no case, which states as the rule that trust estates shall not pass *under general words*, unless an intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the Will, or purposes or objects of the Testator, that he did not mean they should pass. In this case there is no circumstance, except one, that I should observe upon denoting any special intention. It is the *case of a dry trust; all the debts and legacies being long paid*, as I now understand. There was, therefore, a pure legal estate in this Testator; *nothing remaining to be done but to re-convey*. There is no one circumstance in the Will to cut down the general effect upon any notion of intention. The result is: a Will containing *words large enough*, and no expression in it authorizing a narrower construction than the general legal construction—nor any such disposition of the estate as is unlikely for a Testator to make of any property not in the strictest sense his, as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his Wife, as devisee, as to let it descend. I know of no case, in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose, or objects, or the person of the devisee, has been held not to pass the trust estate. If there was any such case I would abide by it; but I do not feel strong enough upon authority or reasoning to dissent from the decision of the Master of the Rolls. Lady Alston, therefore, has in her the legal estate.”

Supported by such authority, it seems impossible to get

out of plain definite language, which distinctly directs the Trustees to convey to Joteendro the entire interest in the real estate and premises, subject to the limitations directed by any allusion to executing one conveyance. The Court overlook the fact that the Trustees were positively directed to convey the entire estate, and not a limited interest, to Joteendro.

In order to show that the interest remaining in the Testator, after creating life estates and estates tail, if conveyed by the Trustees would convey an immediate vested interest, I will cite a passage from Mr. Lewis's work on "Perpetuity." At p. 253, he observes: "Where a person being entitled to a reversion, or remainder expectant on the determination of an estate tail, either general or special, devises the property to another, after failure of issue of the tenant in tail, being the issue entitled under or inheritable to the entail, *the commencement of the devise, in such a case, takes place*, in point of interest *immediately* upon the death of the Testator, and only the event on which the estate devised shall take effect in possession is postponed: that is, the property limited is a present fixed interest, although it must wait for future possession. In other words, the contingency contemplated has reference only to the event on which the Testator's power of disposal arises, and the devise therefore ensures as a present gift of a future expectancy." This is the plain sense of the matter, and whether you call it a reversion or merely the interest remaining after the estates for life or in tail, is absolutely unimportant, for in either case Joteendro takes.

The observations of Lord Eldon in the case of Church v. Mundy, which I have cited from 15 Vesey, are remarkable. At p. 406, he observes: "If the Testator had been asked whether he meant to dispose of his reversion if his Brother should be living, his answer would have been that he intended to dispose of all he could dispose of, to take the chance for his Wife and children; if the event of his Brother's death within a week, without barring the entail, had been put to him, he would have answered, that in that event he intended to pass this property, and he would not have thought it necessary to republish his Will.

There is no necessity here to ask such questions, but it surely is no light additional reason for not interfering with plain language, to find that the construction I put upon this plain clause supports the Testator's intention, whereas the construction the Court have put on this Will is not only inconsistent with such plain expressions, but actually defeats the Testator's express directions and declared intention.

The mistake of the Court below in supposing that the direction to convey was void, either on the ground of uncertainty or remoteness, and which error I have explained prevented them from seeing that the direction to the Trustees to convey the real estate and premises to Joteendro was the plain residuary clause applicable to the real estate, which no law contravened. Mr. Justice Norman, at p. 236, sees the trust to convey, but erroneously supposes it to be void on the grounds above stated.

Both in the case of the personal estate, and with reference to the real estate, the Court have been explaining away plain and clear language. Yet they appear to admit that the personal estate must follow the directions regarding the real estate. It appears to me that the entire real estate is plainly and clearly conveyed—first, by the life interests and estates tail directed; and, secondly, by the reversion being included under the clause I have alluded to. After the authorities and cases I have cited, it seems to me impossible to contend that any portion of the real estate was undisposed of. The accuracy of such a remark I leave to the judgment of the public, and especially the members of my own profession.

If the preceding authorities support my construction of the clause regarding conveying the real estate and premises, the Plaintiff would take no interest either in the personal or real estate, for the Court admit that one was intended to follow the other.

LIFE INTERESTS.

I now approach the examination of that portion of the decree which, after establishing the life interest of Joteendro,

declares subsequent life interests given to parties in existence at the death of the Testator, invalid.

The words of the decree are: "Upon this a question arises whether Sourendro Mohun Tagore, Promodecoomar Tagore, and Suteendur Mohun Tagore, take life interests successively after that of Joteendro Mohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates, with which they *were linked*, and upon the failure and determination of which they were to arise." This may be considered in reference to Sourendro Mohun Tagore, as the other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the Testator no person to take under the first series of limitations except Joteendro Mohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law "a failure" of the estates at the death of the Testator which no subsequent event could affect, and that the interest for life after the death of Joteendro then became vested in Sourendro. The answer is, that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the Testator contemplated that his Will might be void in law, which as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground for supposing he suspected." Then, after putting certain hypothetical cases, the Court come to this conclusion:—"Their Lordships reject the conclusion, either that the Testator meant to give an uncertain interest in so strange and shifting a character; or that there was an intention to give an absolute estate to precede the prior estates, in the event (not appearing to have been contemplated by the Testator) of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact, of an estate or estates which the Testator considered sufficient in law, and that *these limitations over were* in the scheme of this Will intended to FOLLOW THE CREATION of the prior estates of inheritance, and must fall therewith. "Their Lordships are thus

of opinion that a life interest has been created in Joteendro, and that the estates of inheritance and subsequent estates or interests attempted to be created by Will have failed."

The depriving Sourendro and the others of their life estates is founded on an entire fallacy, which I will endeavour to explain. Before I address myself to the subject, it may not be useless to call attention to the remarks of an eminent writer. Mr. Jarman, when treating, at his 50th chap. p. 751, Vol. II. 3rd edition, on the effect of a failure of a prior gift on an ulterior executory or substituted gift of the same subject, observes:—"Where real or personal estate is given to a person for life with an ulterior gift to B, as the gift to B is absolutely vested and takes effect in possession whenever the prior estate ceases or fails (in whatever manner), the question discussed in the present chapter cannot arise thereon. Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i.e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio*, either by reason of its object (if non-existing at the date of the Will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the Testator's lifetime (without performing the required condition). It then becomes a question whether the executory gift takes effect, the Testator not having in terms provided for the event which has happened, *although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative.*

"The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of *Jones v. Westcombe*, where a Testator bequeathed a term of years to his Wife for life and after her death to the child she was then (*i.e.*, at the making of the Will) *enceinte* with; and if such child should die before the age of twenty-one, then one-third part to his Wife and the other two-thirds to other persons. The Wife was not *enceinte*; nevertheless, Lord Harcourt held, that the

bequests over took effect; and the Court of King's Bench, on two several occasions, in opposition to a contrary determination of the Common Pleas, came to a similar conclusion on the same Will." It is pretty clear what the opinion of this able writer would be on the proposition propounded by the Court.

The observation of the Court, that their Lordships reject the conclusion that the Testator meant to give an uncertain interest of so strange and shifting a character. (The "uncertain and shifting character" refers to an estate given according to the order of primogeniture.) Moreover, this observation has reference to a Will which, if the English law were applied to it, would in substance be carried into execution,—the only qualification of this being, that the clauses which attempt to restrain the tenant in tail from acquiring the fee would be rejected as inconsistent with the nature of the estate.

I now approach the reasons on which the Court reject the claim of Sourendro to a life estate. They are so singular, that in order to avoid misrepresentation, I will again give the passage at length:—"Their Lordships reject the conclusion that there was an intention to give an absolute estate to precede the prior estates, in the event (not appearing to have been contemplated by the Testator) of the prior estates being void in law. Their Lordships understand 'failure or determination,' to mean 'failure or determination' in fact of an estate or estates which the Testator considered sufficient in law; and *that these limitations over* were, in the scheme of this Will, INTENDED TO FOLLOW the creation of the prior estates of inheritance, and must fall therewith."

I now proceed to examine the reasons. The Court appear to affirm that these life interests were to follow the creation of the prior estates of inheritance. This is a singular construction. For the right of Sourendro to a life estate was not a matter *consequent on the creation* of an estate tail in the Son of Joteendro, but was to arise on the *non-existence* of any such estate. The right of Sourendro to a life estate was not dependent only on the actual creation of an estate tail in the Son of Joteendro, but rested on the simple contingency of Joteendro's dying without

having a Son—adopted or natural. Moreover, such limitations of life estates are limitations which must take effect during the life of the parties who are all in existence, and were made by a party who could have given a lease for 1,000 years at any rent he chose. If every limitation in tail male in this Will were void, it would not affect the limitation of the life estates in question, which necessarily must take place within lives in being or not at all. Where do the Court find any authority for saying, if the limitation in tail were void, the life estates must fall with them? There is no doctrine in the law of Bengal which supports any such principle. Having declared the limitation to Joteendro's unborn Son void, there is actually no limitation at all which precedes the life interest of Sourendro Mohun Tagore. It is perfectly true that the Testator wished that the limitation in tail male to Joteendro's after-born Son should take place, but he equally wished *and declared* that if no Son existed Sourendro was to have a life interest. The whole of the passage I have given from the decree appears to me to be opposed to as plain a direction as ever found its way into any Will. One may admit that there was an intention to give an estate tail to precede the prior life estates; but such admission does not warrant the deduction of the Court that he intended no life interest should be taken unless such preceding limitation took effect. Instead of the firstestate of inheritance to Joteendro's Son being *linked together* with the estate for life to Sourendro, Sourendro's interest was to arise absolutely *on no such Son existing*. In addition to this, if a Son of Joteendro even existed, and died without male issue, Sourendro would come into his life interest on the ground *of the failure or determination* of such estate by the terms of the Will. "Failure and determination" are not identical. If the Court mean to affirm that Sourendro was only to take after the creation of the prior estates of inheritance, it is assuming a meaning in direct opposition to what is declared by the Testator, which is, that if no such estate to Joteendro's Son arises (and it could not arise unless a Son was in existence), Sourendro was to take a life interest.

The estate to the Son of Joteendro was only to arise on the

contingency of a Son being born or adopted. It is a singular construction to contend that the life estate to Sourendro was intended to follow the creation of the prior estates of inheritance to Joteendro's children, when the creation of such estate of inheritance was dependent on the contingency of a Son being born or adopted by Joteendro. But let me see what has been held in England. In *Avelyn v. Ward* (1 Vesey, senior, p. 420), Lord Hardwicke in the early part of his judgment observed: "I know of no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation *by what means soever is out of the case*, the subsequent limitation takes effect." Mr. Fearne also (edition of 1844, Vol. I., p. 507) remarks: "I have already observed, that where a devise is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate *never should arise or take effect*, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation.

Mr. Fearne, also (at p. 512, Vol. I., 3rd edition), supports the same principle.

The principle laid down was one founded on common sense, and was correctly put by Chief Justice Lee, who, in delivering the opinion of the Court in *Gulliver v. Wickett*, said: "That the limitation over was good; that the devise to the infant being ineffectual was out of the case, and the law was the same, whether the devise immediately preceding the limitation over *was originally void or become so* by non-existence or non-entity of the person Fearne."—Vol. I., edition 1844, p. 510.

The principle above alluded to is applicable to all Wills not merely English.

The wit of man cannot render the life estate of Sourendro and others dependent on the existence of the preceding estate

to the Son of Joteendro. It is not a matter dependent on the existence of that which may not exist, *but it is a gift* if such estate should *not come* into existence. It is a singular way of putting the case, to say that the life estate of Sourendro was *linked together* and directed to follow an estate which never might exist, and when such life estate was given on the non-existence of that which the Court determine must precede it.

What possible objection can there be to the life interests in Sourendro and others? Such must take effect within the lifetime of the parties. No man with any knowledge of the law of Bengal could contend that the Testator had no power to grant a life interest on his estate to his two Nephews, with benefit of survivorship between them. The bequest to the Son of Joteendro was an interest contingent on such a Son coming into existence. If such an event did not happen, nothing prevented the gift to Sourendro. Even in the case of an actually created interest, if, for instance, a Son had been born and died without issue, in the lifetime of Sourendro, it would be a failure or determination of his estate, and the limitation to Sourendro for life would take effect. On what principle does this rest? On the right of a man in Bengal to leave his property as he thinks fit. He can tie it up in perpetuity for religious purposes. He can give it in perpetuity for objects beneficial to the public. He can create leases in perpetuity at any rent he pleases, by Regulation 18 of 1812. He has, as Lord Lyndhurst truly observes, in *Freeman v. Fairlie* (1 Moore I. A.), the absolute dominion over the property. Yet the Court determine that he cannot give a life interest to Sourendro in succession to Joteendro.

The following are the difficulties which the Court imagine would take place:—"If Joteendro Mohun Tagore should beget or adopt a Son, and die, leaving the Son and Sourendro both surviving, either Sourendro (and after him his Son) must take at once and enjoy, to the exclusion of the Son of Joteendro, *in spite of the Will*, or the heir-at-law (who though in terms excluded from benefit 'under the Will,' cannot be excluded from

his general right of inheritance, *without a valid devise to some other person*), must enter and enjoy, during the life of Joteendro's Son and of his issue male, actual or adopted; and Sourendro, or his Son, if he succeeded, must succeed, not as a link in the special chain of succession, framed to keep together the family estate, but in turn with the heir-at-law, whose intervention was not contemplated by the Testator. If Joteendro were to die, leaving power to adopt a Son, who was afterwards in fact adopted, Sourendro would either enjoy absolutely to the exclusion of the Son in spite of the Will, or the heir-at-law would enter as before stated."

The Court suppose many other difficulties would arise. No difficulties whatever would arise if the intention of the Testator was carried out instead of being destroyed. As the heir-at-law, he has been disinherited, and the property, real and personal, has been conveyed by the Testator to Trustees for the benefit of the descendants of his Brothers, with the positive injunction that the Son shall have no part of his estate. Where the Court find any authority in Hindoo law for assuming that the heir cannot be disinherited without a valid bequest to some one else, I know not; but here I may as well remark that the *entire real estate* has been absolutely conveyed, and that there is with regard to it *no intestacy whatever*.

The Chief Justice, Sir Barnes Peacock, in his remarks in support of his judgment, when alluding to the Testator's giving a life interest to Sourendro in the event of no Son being born or adopted by Joteendro, never supposed for a moment that the Testator intended that the absolute existence of such Son, natural or adopted, should be a condition precedent to Sourendro's taking a life interest in the event of no Son being born or adopted.

In direct opposition to the construction of the Court, Sir Barnes Peacock, at p. 184, observes: "That he had no doubt that it was in the contemplation of the Testator that the limitation to Joteendro Mohun's Sons, whether natural or adopted, and the heirs male of their bodies *might fail*, and that it was his intention that upon such failure, the estate should go

to Sourendro, if he should survive, or pass into the ulterior limitations according to the directions in the Will. This is a plain common-sense view of the matter, amply supported by the language of the Testator."

When the Court are restricting the power of a Testator to give a life estate to one Brother on the simple event of an elder Brother dying without a Son, it may be as well to consider the nature of a Father's power in Bengal over his property. This I have alluded to above, and in my former remarks, but I will illustrate this matter by a few additional observations. In a Hindoo case, decided by the Privy Council, *Sonatin Bysack v. Sreemutty, Juggut Soondery Dossee* (8 Moore I. A. p. 66), the Court below determined that an alienation was void as tending to a perpetuity. The Privy Council reversed the decision, and established what in English law would be a perpetuity; but I shall have occasion presently to allude more fully to this case, which is of great importance with reference to the power of the Father.

I have already explained that the reason why gifts for religious or for objects beneficial to the community are supported, and that it is not the mere religious intent or benevolent purpose which gives validity to the grant or dedication, but the unlimited and uncontrolled power of the Father; I may also add that no one can establish any such permanent interest except a proprietor who, as Lord Lyndhurst remarked in *Freeman v. Fairlie*, *has dominion* over the estate. That great Judge, Lord Lyndhurst, in his celebrated judgment in the above case, contemplated no such restriction as is assumed by the judges in the present cause—that a man could not give one life interest after another. That learned writer, Mr. Jarman, in his book on Wills, at page 261, Vol. I., 3rd edition, ridicules such an idea. In England, Mr. Jarman observes, a long succession of lives to unborn persons, and their issue, is valid if subjected to the restriction that, in order to take, they must come into existence during lives in being and twenty-one years afterwards. How can the Court throw overboard the remarks of

one of the most eminent of the Privy Council Judges: "That no law imposed any limitation as to a native dealing with property of which he was the absolute owner." Even the Chief Justice in the Court below, Sir Barnes Peacock, observes: "If the Testator can disinherit his Son by devising the whole of his estate to a stranger, there seems to be no reason why he should not be able to devise his estate by giving particular and limited interests in the whole of the property to different persons in existence, or who may come into existence during his lifetime, to be taken in succession, as well as by giving his whole interest or bundle of rights in particular portions of his land included in his estate to different persons." There are one or two cases which bear on the question of a limitation failing or being void, which I will give. The first is *Meadows v. Parry* (1 Ves. & Beames, p. 124.) The marginal note is, "Limitation over after a limitation which never took effect established, not operating as a condition precedent."

In this case, George Meadows Parry, by Will dated 9th November, 1809, gave the residue of *his estate* to his Wife, Rebecca Parry, and two other persons, "upon trust that they do and shall apply the dividends and interest of the said securities so to be purchased upon and for the maintenance, clothing, educating, and placing out in the world, of all and every such child or children as I may happen to leave at my death, and born in due time after, equally share and share alike, until they shall respectively attain the age of twenty-one years; then, upon trust to pay, assign, and transfer, their share of the funds and securities, in which the same residue shall have been so invested, equally; and in case any or every of the said children shall happen to die before twenty-one, such deceased children's share to go to the survivor; and in case there shall be only one such child which shall attain that age, then in trust to pay the same residue to such only child, as his or her own property for ever; but in case it should happen that all the said children shall die before attaining that age, then and in

such case, I give and bequeath all such residue unto my dear Wife Rebecca Parry, her executors, administrators and assigns, for ever, as her own sole and absolute property;" and the Testator appointed the Trustees joint Executors.

The Testator died without leaving, or ever having had, any issue. A Will was filed by the Plaintiff, as one of next of kin, against the Widow for a moiety of the residue, insisting that as the Testator died without issue, the residue was distributable as undisposed of by his Will.

The Master of the Rolls (Sir W. Grant) said this case could not be distinguished from those in which, where a Testator devised to a child with which his Wife was *enccinte*, and if such child died before twenty-one, then over; the devise over had been held to be good, though she proved not *enccinte*.

In the marginal note to Rouse's case (Lofft's Repts., p. 97), it is observed:—"A devise over upon the happening of a contingency which, although taken for granted by the Testator, never did happen, shall nevertheless take effect."

Upon the same principle, a bequest over (Mr. Jarman is speaking, p. 752, Vol. I., 3rd edition), *in the event of* the prior legatee having but one child, has been held to extend by implication to the event of her not having any child. Thus, in the case of *Murray v. Jones* (2 Ves. & Beames, p. 313), where a Testatrix, after bequeathing the residue of her personal property to her Daughters and younger Sons, provided that in case she should have but one child living at the time of her decease, or in case she should leave two or more Sons and no Daughter or Daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more Daughters and no Son or Sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both Sons and Daughters, and all but one, being a Son, should die under twenty-one, or being a Daughter under that age and unmarried, then she bequeathed the property to another family. The Testatrix died without having had a child; but Sir William Grant,

M.R., held that the ulterior gift, nevertheless, arose ; his opinion being that the case put by the Testatrix, namely, that of her having but one, *did not contain a condition that she should have one child living at that time.* Mr. Jarman, at p. 753, 3rd edition, observes (his reasoning well deserves a particular statement):—"At first sight," said the Master of the Rolls, "a proposition relative to having but one child may seem to include in it, and to imply, the having one. That is true, if the proposition be hypothetical or conditional. The proposition that A has but one child, is as much an assertion that he has one as that he has no more than one ; but when the having of one is made the condition on which some particular consequence is to depend, the EXISTENCE OF ONE IS NOT REQUIRED *for the fulfilment of the condition*, unless the consequence be relative to that one supposed child. As if I say that in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion ; but if I say that in case I shall have *but one child of my own*, I will make provision for the children of my Brother, it is quite clear that my having one *child is no part* of the condition on which the *supposed consequence* is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children ; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my Brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

This case seems very important, and I may add, almost in the words of that great and good Judge, Sir W. Grant, that the plain sense of the bequest is, that if Joteendro has no Son, the Brother is to take.

The present case is not a matter consequent on the creating such estates, or dependent on their existence, but arises simply on the non-existence of any child to Joteendro. The cases I have given distinctly show that the belief of the Testator

that such estates would take effect does not justify the destruction of the life interest which was to take effect on their non-existence.

The Appellate Court, by their remarks on the judgment of Lord Justice Bruce, in 9 Moore, 135, seem aware of the absolute necessity of getting rid of the doctrine laid down by him. That I may not misrepresent, I give their remarks. This case was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindoo succession, and Mr. Justice Phear, upon the authority of that case, held that—"There is nothing in Hindoo law to prevent a Testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council), if at all, at the close of a life in being." The expression in the judgment of the Lord Justice thus relied on was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law, in allowing a Testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist."

"A consideration of the subject-matter to which these remarks were applied will, however, at once show that they were not intended to have the extensive effect attributed to them. *The question was not as to the effect of a gift to a person not in existence*, but whether a person in existence, and capable of taking under the Will when it had effect, might become entitled upon a future contingency to receive an additional benefit." This is not a correct way of putting the decision of the Privy Council in the above case. Lord Justice Bruce, in delivering the opinion of the Court, never said, or intended to say, that the English law as to remainders or executory devises applied in

Bengal ; he was illustrating his observations. The Court lay down this principle, that there was nothing to prevent a party who has given a life estate to another from giving such estate over in the event of that party dying.

“ Lord Justice Bruce in each case also observed (p. 135), that such powers have long been recognized in practice. The law of India, at least the law of Bengal, has long been administered on that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal ; at least, the law of Bengal has long been administered on that basis.

“ Their Lordships, therefore, being of opinion, as has already been stated, that, according to the meaning of this Will, the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the Will was made, and seeing that that event has happened, consider that the Testator in making this provision did not infringe or exceed the powers given him by Hindoo law, and that the clause effectually gives the corpus of the property to the surviving Sons immediately on the death of that Son who died without male issue.” Now this shows the Father’s power ; *for the Widow*, but for the Will, was the heir.

Could any one conversant with the law of Bengal as applicable to Hindoos, contend for a moment that the Testator, after giving a life interest to Joteendro, could not give the whole remaining interest to Sourendro ? If a Testator has authority to grant the whole of his estate, unless some law prevents him, surely he can give a part.

I will now show that the judgment of Lord Justice Bruce lays down no new law, but is supported by repeated decisions of the Privy Council. In the case of *Rada Persaud v. Radha Bebee* (4 Moore, I. A., p. 137), which came before Lord Brougham, Lord Langdale, the Right Honourable Dr. Lushington, and the Right Honourable Pemberton Leigh ; assessors, Sir E. H. East and Sir Edward Ryan ; a Hindoo domiciled in the north-west provinces made a Will in the

following terms :—" After my decease, of the half-share of the mercantile establishments belonging to me of right, my Widow (Mussumat Meetabhoo) shall be the mistress and disposer. If, during the lifetime of my Widow, my Brother, Beekary Doss, or my Nephews, to wit, Koonj Behary Lall and Mudden Mohun and Goonee Lall and Dias Lall, shall lay any claim to the half-share of the mercantile establishments, mine by right, it shall be held false ; my Widow is the mistress and disposer of the half-share belonging to me, the declarant. Touching acts of religion, endowments, and alms, and other acts, good and bad, and, moreover, whatever she pleases, she is competent to perform. Let no one molest her. After the decease of my said Widow, whatsoever may remain of the property under her control, let it be disposed of as follows, to wit :—Rupees 20,000, let the Wife of Beekary Doss, my Brother, take. In the event of her not surviving till then, let the Sons of my said Brother take the same ; Rupees 25,000, for the expenses of '*Sadaburt*,' shall be deposited in some creditable house of business. After the above-mentioned two items, whatever of houses, orchards, godowns, cash, woollen and other goods may remain, after the use of my said Widow, let my Brother Beekary Doss, aforesaid, and, after the death of my said Brother, his Sons, take one half, and let Goonee Lall, and Dias Lall, who are the Sons of Bhowanny Persaud, my deceased Brother, take the remaining half."

In this case there were lands. The Will describes them as "houses, orchards and godowns." Held, that C and D took vested interests in the moiety as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate. Held, in such circumstances it was not necessary that C's share should be reduced into possession during his lifetime to enable his widow to succeed to it. This is a case strictly pertinent, for the Widow did not take as heir. It is, moreover, diametrically opposed to what the Court in the present case say was to be collected from Lord Justice Bruce's judgment, for it shows that the entire interest in landed estate may be given over on the death of a party even *in*

shares. In this case, after the death of the tenant for life, the whole property was given over, half to one Brother and his Son, and the remaining half to the Sons of his other brother. The case I have mentioned in which Lord Justice Bruce gave judgment, originally came before the Court on demurrer. It is reported in 6 Moore, p. 551. The marginal note is : "A Testator, by his Will, made an absolute gift of his real and personal estate to his five Sons (an undivided family) in equal shares, and in a subsequent part of his Will, in the event of any of his five Sons dying without Son or Son's Son, there was a gift over to such of his Sons or Son's Sons as should be alive. After death, Sons lived together and no partition made. The surplus income being kept in common stock, on the death of one of the Sons without leaving Sons or Son's Sons, Widow claimed Husband's share of accumulations of income and the increment thereon. Held, upon the construction of the Will, that in the absence of any direction of the Testator that his Sons should continue a joint family, such an intention could not be imported into the Will, and that the Testator's intention was that his Sons should enjoy during their lives the interest of their respective shares of the property ; and therefore that, although the deceased co-sharer's share went over to the survivors, the Widow of the deceased was entitled to the one-fifth of the surplus income which had accumulated since the Testator's death and during her Husband's lifetime, and the increment arising out of the accumulations." Now, although this was on demurrer, it was an express decision that one life interest might be given after another, and this case ultimately came before the Privy Council on general hearing (9 Moore, p. 123). It will be noticed that in this case, in 6 Moore I. A. (*see* judgment, p. 551), "that the Testator, in the first item of his Will, makes an absolute gift of one-fifth of all his property to each of his Sons, but in the eleventh item of the Will, in the event of any of the five Sons dying without a Son or Son's Son, there is a gift over to such of the other Sons or Son's Sons as may then be alive." It will be seen, therefore, that although he actually, in the early part of his Will, gives an absolute

interest, yet in the latter part he cuts down such interest to a life estate, and such is supported both in this judgment and that before Lord Justice Bruce. It is clear, therefore, that were he to limit an estate to a person for life, that on the death of that party he could limit it to another; this necessarily flows from the principle admitted. The above cases establish conclusively that on the death of one, property may be given over to another. The observation of the Court in endeavouring to free this case from the principle laid down by Lord Justice Bruce, "That the question was whether a person in existence and capable of taking under the Will when it had effect might become entitled upon a future contingency to receive an additional benefit," cannot get rid of what was decided in the case in 4 Moore, I. A., p. 137. In the case before Lord Justice Bruce, the Testator, on the death of the Son, childless, gave over his partial interest to the Sons living. In the present case, what is there to prevent him from giving a partial interest in the estate to one Brother after another? Literally nothing. If he had given the property to five persons for life, could he not give it to others after their decease? If there be any law that prevents this, let it be pointed out. It will be seen that the judgment of the Privy Council on which I am commenting, rests their opposition to the life interest of Sourendro mainly on this extraordinary proposition: "That the limitations over were in the scheme of this Will intended to follow the creation of the prior estates of inheritance, and must fall therewith." It seems to me that what is propounded is a plain fallacy. What a curious following that must be, to follow that which never existed. It was on the non-existence of any Son that Sourendro was to take, not that his interest was to follow an estate which the Court declare to be absolutely void. What was decided in the case before Lord Justice Bruce was in perfect unison with what was decided on demurrer, and also with the previous case in 4 Moore, I. A., to which I have alluded; and that was, having given an estate to one of the Sons for life, he had the power to give the share of one of

the five Sons to another on his dying without male issue, and this contrary to the ordinary law of descent.

But there are other cases of the Privy Council which support the principle laid down by Lord Justice Bruce. In the 9th Weekly Reporter, at the end of the volume, the case of *Prankisto Chunder v. Sreemutty Bamasoonderee Dossee* is given. The marginal note is: "The Testator directed that on the death of a Son, if that Son died leaving a Son, the share of that Son was to go to that Son's Son, and if the Son dying left no Son, that the share should go to the survivors. Held, that the share of profits made during the joint lives of the Sons which belonged to the deceased Son goes over to the other Sons of the Testator *as they would go according to law*, as from a consideration of the various terms of the Will itself, there was an absence of all directions on the part of the Testator to accumulate the profits, or to dispose of the profits which were the property of the Son." This is a strong case, because the gift over was not, as the marginal note erroneously states, in unison with the Hindoo law, but was in derogation of the law, which, but for the Will, would have given the estate to the Widow. There is no mistake in the judgment delivered, for the Widow was excluded by the express language of the Will.

The case of *Sonatun Bysack*, in 8 Moore, p. 66, is most important in connection with the preceding cases and the above remarks. In that case, a Hindoo, by his Will, gave all his movable and immovable property to his family Idol; and after stating that he had four Sons, he directed that his property should never be divided among them, their Sons or Grandsons in succession, but that they should enjoy the surplus proceeds only; and the Will, after appointing one of the Sons manager to the estate, to attend to the festivals and ceremonies of the Idol, and maintain the family, further directed, that whatever might be the surplus, after deducting the whole of the expenditure, the same should be divided annually in certain proportions among the members of the family. At the date of the Will, the family was joint in estate, food and worship; the accumula-

tions of the income were divided as directed by the Will. The Calcutta Court declared the bequest void on the ground of a tendency to create a perpetuity. This was expressly overruled by the Privy Council, and it will be seen that the Court, at p. 89, established what in England would be deemed a perpetuity, in the following words:—"Their Lordships are of opinion that it ought to be declared that, according to the true construction of the Will of the Testator, the whole of the Testator's movable and immovable property was and is well and effectually given for the benefit of the Testator's four Sons in the Will named, *and their offspring in the male line*, as a joint family, *so long as the family continues joint*, subject however to the performance of the acts, business, ceremonies, and festivals, and to the provisions for maintenance in the Will contained; and that the surplus income of the property, after answering such performance and provision, was, and is in like manner, well and effectually given for the benefit of the said four Sons and their offspring in the male line as a joint family, so long as the family continues joint. And, it appearing that Krishnomungle Bysack, one of the four Sons, died leaving three Sons, their Lordships report, in their opinion, that it ought to be declared by Your Majesty that each of the three Sons became entitled to a third part of one-fourth part of the property and of the accumulation thereof; and it appearing that Hurrymohun Bysack, one of the three Sons of Krishnomungle Bysack, died, leaving no male offspring, and that the family continued joint up to the time of his death and still continues joint, their Lordships do further repeat as their opinion that it ought to be declared by Your Majesty, that upon the death of Hurrymohun Bysack, the third part of the fourth part of the property and accumulations to which he became entitled as aforesaid, passed to the Respondent Sreemutty Juggulsoonderee Dossee as his Widow and heir, and Sreemutty Juggulsoonderee Dossee accordingly became, and is entitled as such Widow and heir, to the third part of the property and accumulations."

Now, this case is of the utmost importance in showing that a Testator can effectually tie up a property to descend to the

heirs male of his children, so long as the family continues joint, and such heirs male exist. It will be remembered, moreover, that the Will in this case was in derogation of the ordinary rule of descent; for, but *for the Will*, the Widow, by the law of Bengal, was heir. Under this decree, the Sons could not sell the estate, but it must descend, if they continued joint, to the male offspring.

Now what is the principle which justifies such a decree? It is this, that in Bengal, and with reference to self-acquired property without Bengal, the Father is the entire owner. The Regulations of Government to which I have alluded give full power to Zemindars and other landed proprietors to convey any interest they may think proper. All this was examined by that great and learned Judge, Lord Lyndhurst, in *Freeman v. Fairlie* (1 Moore I. A). In Bengal, they have the entire dominion over the property. The law which regulates the descent of property must not be confounded with the power which arises from having dominion over the estate. The fallacy which pervades alike the judgment of the High Court and which finds its way into the decision I am now commenting on is this—that a Hindoo in Bengal cannot create an estate tail. The proposition is not true with reference to Bengal, for English conveyances have long been used by the natives in Calcutta.

Now, who were the Judges in the above case? They were, “The Right Honourable Lord Chelmsford, the Lord Justice Knight Bruce, the Right Honourable Sir Edward Ryan, and the Right Honourable Lord Justice Turner,” who delivered the judgment of the Court. I think I may venture to say that no one can peruse the different judgments delivered by this good Judge, Lord Justice Turner, in Indian causes, without being struck with the anxious desire to do justice which eminently characterizes them. The construction which the Court have put upon the present Will appears to me to be utterly at variance with the plain and clear principles laid down by Lord Justice Turner and Lord Kingsdown, which I have above given.

It will be seen that when the Court are endeavouring to free this case from the application of Lord Justice Bruce's remarks, they endeavour to draw a distinction between the present case and the one last mentioned, by pointing out that the giving over of the share on the dying of the party entitled, was only giving an additional interest to a party existing. The Court could hardly deny that a party could give a life interest to one, and give the entire estate afterwards to another. If the Court had attempted directly to maintain that the absolute owner of property was in any way controlled in giving one life estate after another, they should have pointed out distinctly what law prevents him.

No law has ever interfered with the power of the Father in Bengal to give any interest he thought fit in his estate to another. One would suspect, from the observations of the Court in the present decision on the case before Lord Justice Bruce, that the Court imagine that some law exists restricting a Father's power in giving one life interest after another. The anxiety manifested in this matter speaks little for the accuracy of their construction of the Will of the Testator.

The clause in the Succession Act of 1865 is as follows:—
 “100. Where a bequest is made to a person not in existence at the time of the Testator's death, subject to a prior bequest contained in the Will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the Testator in the thing bequeathed.”

The Indian Succession Act, passed in 1865, by clause 331 declared that, “The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindoo, Mahomedan, or Buddhist.”

When the Court below attempted in their remarks to apply the principle in clause 100 of the above Act to the present case, in my preceding remarks at page 265, I observed that they were endeavouring to frame an argument founded on analogy, when the Legislature had expressly declared that analogy there should be none. At the time of suit and even after the decree in the Court below, this Act of 1865 was the only

Act which applied to succession. This Act of 1865, for what reason does not appear, took away the rights of British-born subjects, and introduced a law applicable to their estates different from what prevails in England. After the decree in this cause, in spite of the remonstrance of the natives, an Act was passed making section 100 applicable to them, but the Act was not retrospective. This clause, moreover, is direct evidence that at least, according to the opinion of the Indian Legislature previous to such Act, one life interest after another would not be invalid. The Appellate Tribunal have not attempted, even in argument, to make use of an Act which has legally no application to the case.

From the remarks of the Court in their judgment on Lord Justice Bruce's remarks, they would appear to consider that a Father's right to tie up property was restricted, though the case only shows that Lord Justice Bruce considered that a party was not prevented from giving property over on the event of a party dying. I have been arguing this matter, taking for granted that a Testator, under the authorities cited, might give property to one after another. It was in no degree necessary for me to do so.

Freeman v. Fairlie (1 Moore, I. A.) decided that a Father, under the Regulations of Government, had absolute dominion over the estate. The entire Daya Bhaga supports this, and the power even of creating perpetuities is expressly allowed. He might give the whole estate away, and nothing could consequently prevent him from giving a part of the same, unless some law applicable to this case can be produced; no such law exists.

The instances which I have given of lands being appropriated, either for religious purposes or for objects beneficial to the public, when *duly attended to*, are literally decisive as to the uncontrolled power of the Father over his estate; and this is founded on the absolute dominion over the same, as was laid down by that great Judge, Lord Lyndhurst, in the case in 1 Moore, I. A. By such grants he creates a perpetuity. No objection, as was correctly stated by Sir Barnes Peacock, has ever been

made by the Sudder Dewanny Adawlut with reference to tying up property, and the absence of such directly contradicts the principle affirmed by the Court in the above judgment.

The Court would appear not over confident in their first ground of opposition to the life interest in question, by their observations on the judgment of Lord Justice Bruce. In that case, Lord Justice Bruce observed that he saw no objection to giving one life interest after another; and after the authorities I have cited, what possible objection can there be? I have shown that in Bengal a party can tie up property in perpetuity. In the case of *Mussumat Bhobun Moyee Debia v. Ram Kissore Archarj Chowdry* (10 Moore, I. A., p. 310), some remarks fall from Lord Kingsdown, in giving judgment, which I may as well notice. His Lordship, at p. 311, observes: "Whether under his testamentary power of disposition, Gour Kissore could have restricted the interest of Bhowanee Kishore in his estate to a life interest, or could have limited it over (if his Son left no issue male, or if such issue male failed) to an adopted Son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this." There can be no doubt what answer should be given to such remarks. The present decree even, the decision of the five Judges of the Sudder, the Regulations of Government, and the admission of this respected Judge himself, regarding the power of the Father, show that the Father in Bengal has no such restricted power. I defy any one to produce a law applicable to this case, which prevents a Father from giving one life interest after another.

The decision itself in this case has not escaped examination. Saumchurn, speaking of the above case, at p. 790 of the octavo edition, observes: "The above decision does not appear to be quite consistent with the Hindoo law as current in Bengal, where the doctrine of '*factum valet quod fieri non debuit*' prevails. In the first place, their Lordships ought to have inquired and considered whether in Bengal a man is competent to provide for the perpetuation or continuance of the offering of the oblations of food and libations of water to the

manes of himself, his Wife, and their ancestors, and to regulate the succession to his estate. Had they done so, they would have been satisfied that it is not only the sacred duty of, but also incumbent on a man destitute of male issue to adopt a Son; that a man having a legitimate Son may not only authorize his wife to adopt a Son after his death, failing such legitimate Son, but also, failing the Son so adopted, to adopt another in his stead; that a Hindoo in Bengal may leave by Will, or bestow by deed of gift, his possessions, whether inherited or acquired, and the gift or legacy, whether to a Son or a stranger, will hold, however reprehensible it may be as a breach of an injunction or precept; that a Hindoo who has Sons can sell, give, or pledge without their consent, immovable ancestral property situate in the Province of Bengal, and that without the consent of the Sons, he can by Will prevent, alter, or affect their succession to such property. Such being the settled law of our country, Gour Kissore was quite competent to empower his Wife to adopt a Son in the event of his begotten Son being non-existent, and to affect his heritable right and succession in the manner he did. Consequently, the paper writing by which he did so (and which is merely a documentary proof of what was done by him), be it termed a Deed of Permission, Gift, or Will, is, to all intents and purposes, a valid deed, which could not be rendered inefficacious without the performance of the acts therein directed. Under such circumstances, effect ought to have been given to it according to Gour Kissore's intention, which could only be gathered from the legal and intrinsic signification afforded by the words used by him. Now the phrase, 'having regard to the future,' and that 'to avoid the extinction of the pinda,' contained in the deed in question, signify that the presentation of the oblations of food and libations of water should be perpetuated by the continuance of the lineage by adoption, on failure of that by birth; consequently, Bhowanny's having lived to an age which enabled him to perform for a Father is not all sufficient, the same not being tantamount to his having actually performed *all* the services which he ought to have performed, inasmuch as a Son's duty

to his Father is to perform religious services, not once for all on his coming of age, but to continue to perform, year after year, the anniversary Shradhas and the periodical Shradhas called parvana, and moreover to liquidate his own debts to ancestors by continuing the lineage, that is, by having a Son begotten or adopted. Such being the case, their Lordships should not have presumed that Bhowanny had performed *all* the religious services for his Father, when it was impossible and unpracticable for him to do so. Moreover, he did not, and could not, perform any of the services for his Mother who survived him, and for whose obsequies, also, a Son was directed by Gour Kissore to be adopted; and this direction of his is quite consistent with our law, which, apprehending the discontinuance of the offering of the oblations of food and libations of water by the premature death of a man's Son, has provided the adoption of a Son in the event of his natural born Son dying without male issue, the existence of a begotten or adopted Son for a time, and the performance by him of the religious services during that time, not being sufficient in the eye of the law.

"Their Lordships further remark that: 'The Onoomuttee-putter does not in express terms assign any limits as to the period within which the adoption may be made.' But the expression, 'if the male child of your body be non-existent, then you will adopt a Son,' plainly fixed the time at which the right to adopt was to accrue; and as Chundrabully was authorized to make the adoption, the end of her life must be taken to be the other limit (as mentioned in East's Notes above cited) within which the adoption could be made." Then, after some other remarks, Saumchurn observes: "But this was not the issue before their Lordships; what they had to try was, whether, on the death of Bhowanny without male issue, Chundrabully was competent to exercise the power granted to her by her Husband Gour Kissore. Had their Lordships tried this simple issue, determining the construction of the Onoomuttee-putter and the intention of Gour Kissore by the application of Hindoo law, at the same time taking into consideration the circumstance of Bhowanny's dying childless, their

Lordships would have been convinced that the limits between which the power in question might be exercised were the death of Bhowanny and that of Chundrabully. As to their Lordships' observation, 'that he (Bhowanny) had succeeded to the ancestral property as heir, he had the full power of disposition over it, he might have alienated it, he might have adopted a Son to succeed to it if he had no male issue of his own, and he could have defeated every intention which his Father entertained with respect to the property,' it is also inaccurate. In the first place, Gour Kissore, having affected Bhowanny's succession to his ancestral property, making it conditional until he should perpetuate the offerings of the oblations of food and libations of water, as well as direct heirship to the estate by begetting or adopting a Son, the latter did not, and could not, succeed to the property as (absolutely) his own, and in consequence he had not had the unlimited or full power of disposition over that property which he took, subject to the reversion to Gour Kissore's adopted Son in the event of his dying without male issue; and not having the full power of disposition, he could not have alienated the property at pleasure, nor could he have defeated every intention which his Father entertained with respect to that property."

The above observations of the worthy Chief Interpreter of the High Court are plain and intelligible. But, for the satisfaction of English readers, I will now point out what religious inducements, in addition to the principles which Saumchurn has alluded to, are held out, and which render a continuance of lineage, to a certain extent, indispensable. *Menu* points out the necessity of continuing the lineage, and the rewards attending it. At Chapter IX. section 137, he observes:—"By a Son, a man obtains victory over all people; by a Son's Son, he enjoys immortality; and afterwards by the Son of that Grandson, he reaches the solar abode."

Yajnwalcha, also (3 Digest, 296), observes:—"Through a Son, a Son's Son, and the Son of a Grandson, the Father or ancestor obtains bliss in other worlds, immortality and heaven." An attention to the above texts seems to me to support the

accuracy of Saumchurn's remarks on the case in 10 Moore I.A. Sir William Macnaghten, at pp. 83 and 84, Vol. I; and 1 S. D.A., pp. 209 and 326, are distinctly opposed to the decision I have alluded to.

I have deemed it right to notice the general remarks made by Lord Kingsdown in the above judgment regarding limiting the power of the Father, as such are clearly not in unison with the law of Bengal, the Regulations of Government, and the case of Freeman v. Fairlie. The decision in the above case furnishes an illustration of how even right able men occasionally fall into error when dealing with subjects which they necessarily imperfectly understand.

By the decision of the Judicial Committee in this case of Tagore v. Tagore, the reversion to this great property has been taken away from the family and given to a party distinctly, as it appears to me, disinherited by the Testator.

The life interests of Sourendro, and the life interests of the two infant children, which, as I have attempted to show, no law interdicts, have been declared void.

That although there is no intestacy whatever applying either to the personal or real estate, the Court has declared the contrary.

That although, with reference to the "real estate and premises," the reversion or remaining interest, whatever it may be termed, is expressly and plainly vested, by clear and judicially determined expressions, in Joteendro, yet the Court has held that the Testator has died intestate, and that no valid estate of inheritance, beyond the void estates in tail, has been created; such finding being, as I have endeavoured to show, in direct opposition to overwhelming and plain authorities.

If the view I have taken be correct, such judgment of the Court is alike unwarranted by English and Hindoo law.

The above are the remarks I venture to submit to the legal profession and the public.

I have endeavoured to deal with this case in my own plain way. I have avoided all exaggerated topics. There are some matters, however, connected with this decision which must be

noticed. The pledged faith of the British nation has been given not to interfere with the religious feelings of the Hindoo people. This decision, if I be right in my arguments, does interfere with the undoubted right of a Hindoo in Bengal in distributing property of which he is the absolute owner, according to the dictates of his own religion.

No question of this nature ought ever to arise in Bengal. Act 21 of 1850 was framed on the principle of religious toleration, and enacted that a man entitled to property was not to lose it by changing his religion. It never did enact, or was intended to enact, that the owner of property in Bengal might not follow the injunctions of his own religion in distributing property of which he was the absolute proprietor. It did not, as may be seen from my remarks on religion, repeal the entire law. It did not interfere with the Father's power to will away property from a Son for whom he had already provided. There is no such rule in Hindoo law that a Son can take property when a Father distinctly disinherits him. The principle of English law has no application to the present case. With reference to the real estate, it stands out beyond the possibility of doubt, under express decisions, that the reversion in the same is vested in Joteendro Mohun Tagore. This has, as it appears to me, been entirely overlooked by the Court; for if the reversion was vested in Joteendro, there is no intestacy as to the real estate.

This is a most important matter, connected as it is with the plain principles of justice and the religious feelings of a people. The Government should look to it. The Hindoo inhabitants of Bengal have a claim on the British nation. In the great mutiny, when the safety of the Empire was at stake, Bengal remained faithful. These quiet people only ask not to be deprived of their property when distributing it according to the injunctions of their own religion. Such is surely not an unreasonable request.

